CHAPTER 9

SEXUAL HARASSMENT

LEGAL STANDARDS FOR SEXUAL HARASSMENT

A. Introduction/Overview

The term "sexual harassment" is defined as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."[1]

The Fair Employment and Housing Commission (FEHC) defines sexual harassment as:

1. Unwanted and unwelcome visual, verbal or physical conduct that is sex-based or of a sexual nature;

2. Requests for sexual favors; *or*

3. Offensive third-party conduct to which the victim is subjected.[2]

Sexual harassment is still a widespread problem that can occur in any work environment or when an applicant is applying for employment. This is evidenced by the fact that a significant portion of the complaints filed with the Department of Fair Employment and Housing (DFEH) each year contain allegations that the complainant was subjected to unlawful harassment because of his/her sex/gender. Historically, approximately 20 to 24 percent of the employment complaints filed with DFEH cite sexual harassment as a basis for the complaint.

The right to work in an environment free from discrimination and/or harassment because of one's sex/gender is a *civil right* in California.[3] Workplace sexual harassment cannot be tolerated and must be eradicated when discovered because it violates, among other things, the victim's:

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[1] 29 C.F.R. § 1604.11(a).

[2] California Code of Regulations (Cal. Code Regs.), Title (tit.) 2, section (§) 7287.6.

[3] Government Code section (Gov. Code, §) 12920, 12921, subdivision (subd.) (a). The California courts frequently look to Title VII for guidance in interpreting the FEHA. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129.) Thus, where appropriate, federal decisions will be cited to illustrate points of law which are consistent with the manner in which California courts have ruled or are likely to rule.

1. Privacy rights
2. Personal dignity
3. Emotional well-being
4. Personal boundaries
5. Professional development

Workplace sexual harassment can also have a devastating impact upon the employer. Just *some* of the adverse effects include:

1. Legal fees, costs and fines
2. Damage to the employer's organizational image and reputation
3. Decreased employee productivity
4. Diminished workplace morale
5. Employee turnover, and
6. Costs incurred to hire/train new employees

Accordingly, the California Legislature has placed an affirmative obligation upon employers to prevent, recognize and correct workplace harassment. Additionally, the Fair Employment and Housing Act (FEHA) requires employers to provide information to *all* of their employees about sexual harassment, including an explanation of employer and employee rights and remedies.[4] Additionally, California employers of 50 or more persons must provide training at least every two years for all supervisors and managers.[5]

B. Jurisdiction

1. Who is Protected?

The FEHA's prohibition against sexual harassment protects employees, as well as independent contractors and job applicants.

a. Employees

The term "does not include any individual employed by his or her parents, spouse, or child, or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility."[6]

b. Independent contractors

An independent contractor is "a person providing services pursuant to a contract." That person must meet all of the following criteria:

[4] Gov. Code, § 12950.
[5] Gov. Code, § 12950.1.
[6] Gov. Code, § 12926(c).

1) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.
2) The person is customarily engaged in an independently established business.
3) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.[7]

c. Job applicants

2. Who is Liable?

a. Employers

The harassment must have been perpetrated by an "employer," as that term is defined in Government Code section 12940, subdivision (j):

> (4)(A) For purposes of this subdivision only, "employer" means any person[8] regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent[9] of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision.
>
> (B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit, except as provided in Section 12926.2. [10]

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[7] Gov. Code, § 12940, subd. (j)(5).

[8] "'Person' includes one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." (Gov. Code, § 12925, subd. (d).)

[9] An agent "*acts for and in the place of the principal* [employer] for the purpose of bringing the principal [employer] into legal relations with third persons." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, citing 2 Witkin, Summary of Cal. Law (9th ed. 1987) *Agency and Employment*, § 5, p. 24, emphasis in original.)

[10] See DFEH Enforcement Division Directive Number 213, Complaints against Religious, Non-Profit Organizations.

For additional factors relevant to a determination of whether or not DFEH has jurisdiction over the complaint, see Chapter entitled "Jurisdiction."

b. Dual Employers

When an individual is deemed to be employed by two employers, one or both employers can be held liable for workplace sexual harassment.

The most common example involves temporary employment agencies that recruit and hire employees whom they assign to work for their employer clients. When an employee so hired and assigned is subjected to harassment because of his/her sex, DFEH will accept, file and investigate a complaint naming *both* the temporary employment agency and the employer to whom the employee was assigned as respondents in keeping with the courts' portrayal of those entities as "dual employers."[11] In such cases, the agency is considered the employee's "general" employer, while the employer to which he/she is assigned is deemed the "special" employer.

The grant of authority to the courts and FEHC to impose liability upon both the employment agency and its client is consistent with the public policies underlying the FEHA, i.e., broad interpretation of its provisions in order to prevent and eradicate workplace discrimination and harassment. A contrary result would allow temporary employment agencies to evade responsibility for sending employees into hostile environments.

The obligation to prevent and eradicate harassment falls upon both employers. Therefore, the court or FEHC will examine *both* employers' response to a complaint of harassment in order to determine if each complied with its obligation to take immediate, appropriate corrective action. Accordingly, liability may, depending upon the factual circumstances, be ultimately imposed upon just one, both or neither of the dual employers.

> *<u>Example</u>: The complainant registered with a temporary employment agency and was placed in a position at the same company where her former boyfriend was employed. The two did not work in the same department, but did see each other in the workplace on occasion. Her former boyfriend engaged in a pattern of harassing behavior that*

[11] See DFEH Enforcement Division Directive Number 207.

included glaring and sneering at the complainant, not responding to work-related e-mails/paperwork and shouting at her, deliberately bumping into her in the hallway, and calling her repugnant gender-based names. His conduct not only made her workplace hostile, but interfered with her ability to carry out her assigned duties.

Although the complainant notified her immediate supervisor and the human resources department at her assigned place of employment of the harassing conduct, she did not complain to the temporary employment agency for six months. As soon as she did, the agency documented her complaint, conducted an immediate investigation into her allegations and reported back to her with its findings, and reminded the complainant to report, without delay, any further incidents. The agency's representative also checked back with the complainant a couple of weeks later, at which time she indicated that there had been no additional instances of harassment.

The court found that the temporary employment agency responded appropriately upon learning of the co-worker sexual harassment and, therefore, was not liable to the complainant.[12]

c. Individuals

Under the FEHA, liability will be imposed upon *any* individual who harasses another person in the workplace, so long as there is an employment relationship between the two persons.[13] Whether

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[12] *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174. (The complainant's claims against the employment agency and individual harasser were settled.)

[13] The FEHA imposes liability upon persons who commit "unlawful employment practices." Thus, the FEHC has ruled that in order an "unlawful employment practice" to occur, there must be an employment relationship between the harasser and the victim of that harassment. (*Vernon v. State of California*, (2004) 116 Cal.App.4th 114, 123.) Therefore, the FEHC held that liability for workplace sexual harassment cannot be imposed upon a "person" who is not a manager, supervisor, agent or employee of the complainant's employer. In a case alleging sexual harassment was committed by an individual hired by the complainant's employer as a painting contractor, the FEHA refused to impose liability upon the contractor for his own behavior "toward complainant as a FEHA-covered 'person,' due to the lack of a demonstrated employment relationship between the two." The contractor could not be held liable pursuant to Government Code section 12940, subdivision (j)(1), because that section provides that the *employer* may be liable for workplace sexual harassment directed at its employee by non-employees. Liability does not extend, however, to the non-employee harasser as an individual. (*DFEH v. Hossienipoor* (2004) FEHC Dec. No. 04-02.)

the harasser was employed in a supervisorial or managerial capacity vis-à-vis the victim is irrelevant for the purpose of imposing liability upon the harasser for the harm caused by his/her own actions.

An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.[14]

C. Elements of the Prima Facie Case of Discrimination

1. Quid Pro Quo Harassment

a. The respondent subjected the complainant to unwelcome sexual advance(s), request(s) for sexual favor(s) or other verbal, visual or physical conduct of a sexual nature when:

1) Submission to the conduct was made either explicitly or implicitly a term or condition of the complainant's employment or provision of services; or
2) Submission to or rejection of the conduct by the complainant was used as the basis for [employment] decisions affecting the complainant.

b. The harasser was a manager, supervisor or agent of his/her employer; or

The harasser was not a supervisor or manager and the employer or the employer's agents or supervisors knew or should have known of the harassing conduct and failed to take immediate and appropriate corrective action.[15]

2. Hostile Work Environment

a. The respondent engaged in harassing conduct directed toward the complainant; or

The complainant personally witnessed or perceived the harassing conduct; and

it took place in his/her immediate work environment.

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[14] Gov. Code, § 12940, subd. (j)(3).
[15] Gov. Code, § 12940, subd. (j)(1).

b. The harassing behavior was because of the complainant's sex/gender.

c. The conduct was unwelcome and sufficiently severe or pervasive that it had the purpose or effect of altering the condition of the complainant's work environment or prospective work environment; and

created an intimidating, hostile, abusive or offensive working environment.

d. The environment created by the conduct would have been perceived as intimidating, hostile, abusive, or offensive by a reasonable person[16] in the same circumstances as the complainant.[17]

e. The environment created was perceived by the complainant as intimidating, hostile, abusive or offensive.[18]

f. The harasser was a manager, supervisor or agent of his/her employer; or

The harasser was not a supervisor or manager and the employer or the employer's agents or supervisors knew or should have known of the harassing conduct and failed to take immediate and appropriate corrective action.[19]

D. Affirmative Defenses

With regard to most types of complaints received and investigated by DFEH, the respondent may legally excuse its actions if it can prove the existence and applicability of at least one of the affirmative defenses that are recognized under the FEHA.

However, there are *no* viable affirmative defenses applicable to sexual harassment cases because, unlike some discriminatory actions, there is *no* legal justification for acts of workplace harassment.[20]

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[16] See detailed discussion below.
[17] This is referred to by the courts as the "objective" perceptual component.
[18] This is referred to by the courts as the "subjective" perceptual component.
[19] Gov. Code, § 12940, subd. (j)(1).
[20] *DFEH v. Ring dba Rings Restaurant* (1985) FEHC Dec. No. 85-18. ["There is no affirmative defense which would render conduct amounting to sexual harassment lawful."]

Thus, a respondent may only defeat a claim of sexual harassment by demonstrating either that the alleged behavior did not occur at all or that it was neither severe nor pervasive enough for liability to attach to the respondent. Additionally, in the case of harassment committed by a co-worker or third party, the employer may show that it had no knowledge of the offensive conduct and/or took immediate and appropriate corrective action upon learning of the behavior.

E. Remedies

The complainant is entitled to "make whole" remedies if a preponderance of the evidence establishes that the complainant was subjected to unlawful sexual harassment which caused him/her to suffer harm. He/she is entitled to recoup damages for emotional distress and physical harm suffered as a result of the respondent's conduct, in addition to any compensation for employment opportunities lost, out of pocket costs incurred, etc.

Additionally, DFEH may insist, as a condition of settlement without litigation or as part of the relief requested from the FEHC or Superior Court, that the respondent(s) cease and desist from engaging in similar unlawful conduct in the future. Additionally, DFEH may seek an agreement or order directing the respondent to draft, adopt, implement and disseminate to all of its employees a workplace policy prohibiting discrimination and harassment which fully complies with the FEHA and includes a process by which the respondent's employees may file internal complaints. Moreover, the respondent must agree to provide training outlining the rights and responsibilities set forth in the FEHA to some or all of its employees, depending upon the particularized facts of the case.

See complete discussion in Chapter entitled "Remedies."

F. Legally Prohibited Conduct

The FEHA states:

> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
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> . . .
>
> (j)(1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to

harass an employee, an applicant, or a person providing services pursuant to a contract. . .

. . .

(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.

1. How to Recognize Workplace Sexual Harassment

The following is just a *partial* list of examples of behavior which may be found to constitute unlawful sexual harassment:

a. Unwanted sexual advances

b. An offer of employment benefit(s) in exchange for sexual favor(s)

c. Actual or threatened reprisals after a negative response to sexual advances

d. Visual conduct:

1) Leering
2) Staring
3) Making sexual gestures
4) Displaying sexually suggestive or explicit objects, pictures (still or moving), cartoons, graffiti or posters in any manner, including as part of e-mail transmissions
5) Computer games depicting sexual situations or behaviors

e. Verbal conduct:

1) Foul or obscene language
2) Making or using derogatory comments
3) Gender-specific epithets and monikers
4) Slurs
5) Explicit discussions about sexual activities/behaviors
6) Comments about another person’s physical attributes
7) Spreading rumors about another person’s sexual activities/conduct and/or partners
8) Jokes, including those about gender-specific traits
9) Sexual advances
10) Sexual propositions
11) Sexual innuendo or double entrendres

12) Workplace bullying which adversely impacts one gender more than another

f. Written conduct:

1) Suggestive, obscene or propositioning letters, notes, greeting cards or invitations, including but not limited to those transmitted via e-mail
2) Displaying pictures (still or moving), cartoons, graffiti or posters in a writing, including but not limited to e-mail

g. Physical conduct

1) Unwelcome touching
2) Assault
3) Kissing
4) Hugging
5) Grabbing
6) Coercing another person to participate in sexual intercourse or other sexual behaviors
7) Impeding or blocking movements
8) Any physical interference with normal work or movement.
9) Sexual gestures

h. Other types of conduct:

1) Whistling and catcalls
2) Crude/sex-tinged or gender-specific pranks and practical jokes
3) Holding company functions in an inappropriate environment such as a strip club
4) Inviting inappropriate guests to employer-sponsored functions, e.g., strippers, exotic dancers
5) Sexual favoritism

2. Same Sex/Gender Harassment

Sexually harassing behavior directed at a member of the opposite or same sex as the perpetrator is a violation of the FEHA.[21] The FEHC deemed same-sex harassment actionable as early as 1985. The California courts followed suit in 1993, and the United States Supreme

[21] "Although the [Fair Employment and Housing Act] does not specify whether it prohibits 'same gender' harassment or 'other gender' harassment, no ambiguity is created by this omission. Common usage indicates that in the absence of a modifying adjective, the Legislature intended to prohibit sexual harassment in all cases." (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1416.)

Court recognized that same-sex harassment is actionable under Title VII in 1998.

<u>Example</u>: A male complainant was a prep cook in a restaurant working 40 hours per week. The male owner of the restaurant subjected the complainant to sexual jokes, innuendo, inappropriate workplace commentary and offensive touchings which included:

- *The owner told the complainant that he could be making more money if he did what the owner wanted him to do – the complainant interpreted the owner's remarks as a sexual proposition;*
- *The owner lifted up the complainant's apron, looked down at his pants, laughed, and then walked away;*
- *The owner touched the complainant without his consent, telling him that he had a good body and was good looking;*
- *The owner told complainant that women, including complainant's girlfriend, were no good, and the complainant should get rid of her; and*
- *The owner continuously made sexual jokes and comments in the complainant's presence.*

The complainant found the owner's conduct offensive. It made him feel "weird" because he felt the owner was sexually attracted to him. The complainant felt hurt by the incidents because he enjoyed his work and the owner's conduct did not "make it any easier to work there" and negatively impacted the complainant's relationship with his girlfriend. When the owner learned that the complainant was facing a jail sentence, he told him "some big black n----- was going to f--- him in the a-- and that complainant would then come back and be with [him]." That made the complainant so frightened that he hid at his girlfriend's house for two months until he ran out of money and was forced to ask the owner for his job back. When he returned, however, he told the owner "to stay away from him and that he just wanted to be left alone and do his job."

In its decision, the FEHC did not discuss the fact that the complainant and owner were the same gender (male). Rather, the FEHC analyzed the behavior in question and its impact upon the complainant, finding that the conduct met the legal standard for the imposition of liability upon the owner because the complainant was "intimidated" and there was "ample evidence that [the owner's] comments and touchings made complainant's

work environment oppressive and offensive and interfered with his ability to work."[22]

Example: A female food server was subjected to unwelcome touchings by both her male supervisors and a female co-worker. On several occasions, the female co-worker grabbed the complainant's breasts. Although the complainant protested, the supervisor persisted, causing the complainant to feel "disgusted."

The harassers both admitted the conduct occurred, but contended it was just "playful" and not of a sexual nature.

The FEHC found that the behavior was sexual in nature and indisputably offensive, making the complainant's work environment abusive, hostile and oppressive. The FEHC's opinion contains no discussion about the fact that the complainant and co-worker were the same gender (female). The male supervisor, female co-worker, and employer (restaurant) were all held liable for the harm suffered by the complainant.[23]

Example: The complainant, a creative editor for a movie studio, claimed his supervisor demanded that he stay overnight in the supervisor's hotel suite, informing him that he would receive more money if he cooperated. He also alleged that the supervisor "ordered [him] to play a pornographic film on the VCR, made lewd and lascivious comments about the film, and asked [the complainant] how much he would charge to perform acts similar to those depicted in the film." The next day, the supervisor falsely implied to other persons that the complainant had engaged in sexual behavior with him.

The second such incident involved the supervisor referring to the complainant in a "profane and degrading manner," inquiring into the complainant's private life, and waking the complainant up very early the next morning to request that he take his clothes off. The supervisor stated that he wanted to sleep next to the complainant. The complainant contended that he went to the supervisor's hotel suite because he believed it to be "mandatory" and had been informed by others that a male employee had been fired for refusing to cooperate.

In reliance upon prior decisions of the FEHC, as well as cases decided by federal District Courts around the country, the court rejected the respondent's arguments, including the suggestion

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[22] *DFEH v. Ring dba Rings Restaurant* (1985) FEHC Dec. No. 85-18.
[23] *DFEH v. Villazar de la Cruz, Inc. dba Ricky's Grill* (1990) FEHC Dec. No. 90-04.

that recognizing same gender sexual harassment would require the courts to inquire into the sexual orientation of the parties,[24] *concluding that a complainant may assert a claim for same gender harassment under either the quid pro quo or hostile work environment theories or a hybrid of both.*[25]

Example: Employed as a "roustabout," a male complainant was part of an eight-man crew on an oil platform. He was physically assaulted, threatened with rape, and forced to endure "sex-related, humiliating actions . . ." He eventually resigned from his employment: "I felt that if I didn't leave my job, that I would be raped or forced to have sex."

Rejecting the respondent's argument that recognizing same gender harassment would transform civil rights statutes into "a general civility code for the American workplace," the United States Supreme Court reaffirmed that harassment is not always "motivated by sexual desire." The complainant always bears the burden of demonstrating that the workplace was "not merely tinged with offensive sexual connotations, but [the behavior] actually constituted 'discrimina[tion] . . . because of . . . sex.'" The law does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment . . . We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace – such as male-on-male horseplay or intersexual flirtation – for discriminatory "conditions of employment."[26]

Example: The complainant, a gay man, sought employment as a cocktail waiter in a new "gay bar." During the interview, the owners and managers of the club subjected the complainant to inappropriate questions about his anatomy and physical attributes. Even though he found the inquiries offensive, the

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[24] The right to privacy set forth in both the California and United States Constitutions assures that a complainant's *actual* sexual orientation is not at issue or subject to speculation in the majority of sexual harassment cases. DFEH staff should consult with a DFEH Legal Division Staff Counsel if specific questions/issues arise concerning a complainant or respondent's right to privacy concerning his/her sexual orientation and/or sexual relationship(s) with person(s) other than the alleged harasser. (See Cal. Code Civ. Proc., § 2017.220.)

[25] *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409.

[26] *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75.

complainant answered the questions, attempting to be "witty" because he wanted the job. He enjoyed working at the bar because it gave him an opportunity to socialize with other members of the local gay community and his boyfriend occasionally visited him while he was working. However, the repugnant workplace conduct he attributed to the managers included:

- *During employee orientation and again later in his employment, the complainant and other employees were told that they were prohibited from having sex with customers, but could do so with management.*
- *On Wednesday evenings, "Studs and Suds" night, waiters were required to wear only boxer shorts. Complainant was subjected to groping and fondling by customers, as well as the bar manager.*
- *The bar manager made unwanted sexual comments to complainant throughout his term of employment, including remarks about his physical attributes such as, "Oh my God, look at that," and asked the complainant when he was going to allow him to engage in sexual activity with his boyfriend.*
- *The bar manager offensively touched complainant throughout his term of employment and, on one occasion, grabbed him by the arm, pulled him into a small office, and shut and locked the door. He forced his hands into complainant's pants, kissed him, and asked him, "Don't you want a daddy?" The complainant rebuffed the manager's advances.*

The FEHC found that the complainant was deprived of a harassment-free work environment, even though the complainant "was aware, when he took the job . . . that it was a gay bar with a sexualized atmosphere." The complainant correctly "did not believe, however, that his job gave respondent the right to engage in unwelcome sexual comments and sexually explicit conduct. In fact, complainant [was] fully entitled to protection from the sexually harassing employer, who takes advantage of the employment relationship to require accession to his sexual demands as part of continuing employment." The FEHC held that the behavior at issue was severe, oppressive, and abusive. The complainant was offended, disgusted and felt demeaned by conduct that "fundamentally altered the nature of his employment, making him fearful for his life."[27]

[27] *DFEH v. Jarvis dba Fathom Bar and Nightclub* (2001) FEHC Dec. No. 01-02.

3. Quid Pro Quo (Conditional) Sexual Harassment

Quid pro quo is a Latin term which means "something for something" or "this for that." Quid pro quo harassment is sometimes referred to as "conditional sexual harassment."

The key feature is that the offensive workplace behavior makes the victim's receipt or denial of an employment benefit dependent upon submitting or succumbing to the harasser's advances, offers or demands – which are usually sexual in nature.

The types of behaviors frequently complained about include, but are not limited to:

a. Unwanted graphic discussions of sexual acts;
b. Commentary about the employee's body; and
c. Demands that the complainant go out on dates with and/or engage in sexual conduct with the harasser.

Example: A supervisor tells the employee that if he/she engages in sexual conduct with the supervisor, the employee will receive an employment benefit of some sort such as a raise, promotion, etc.

Alternatively, the victim is threatened with some form of adverse employment action (demotion, transfer, unfavorable performance evaluation, termination of employment, etc.) if he/she refuses to submit or succumb to the harasser's sexual advance.

Example: The female complainant was hired by a licensed real estate broker to provide clerical and domestic assistance. She worked approximately 40 hours per week upgrading the respondent's computer system, answering the telephone, collecting rent from his tenants, and performing light housekeeping, shopping and cooking.

For the first few weeks, the parties' working relationship was professional and cordial until he asked her to accompany him on a business trip where she discovered that he planned for them to sleep in the same bed. When she protested, he insisted that they could "share the bed and that he would leave her alone." She slept on the couch and discovered the respondent spying on her as she bathed the next morning. The respondent also berated her, insisting that she should sleep with him because he was a "stud" and the "King of Richmond." The complainant became extremely upset and returned home alone.

A few days later, the respondent apologized and agreed that their relationship would be strictly professional, but soon after he again insisted that the complainant be involved in a relationship with him, rather than her fiancé. He bought her expensive gifts, commented about her body, and called her at home, often late at night. He insisted she should "take care of him," be available "24-7," that he wanted his "fair share" from her, and stated, "If you need something, you know how it is, no honey, no money." He put up a large sign in the office that said "no honey, no money" and told complainant that she "owed" him and time was running out – she had to either sleep with him or leave her employment.

The FEHC found that the respondent violated the FEHA by conditioning the complainant's continued employment "upon an exchange of sexual favors."[28]

"Loss of tangible job benefits shall not be necessary in order to establish harassment."[29] In other words, a *threatened* loss of tangible job benefit(s) or adverse employment action is sufficient in order to establish that unlawful harassment occurred. It is not necessary that the harasser followed through with or "made good" upon the threatened action in order to make a legally sufficient showing that the employee was subjected to workplace harassment.[30]

Example: A female employee's male supervisor abruptly entered her office and announced that the two of them were going to have dinner together that night. The employee declined, but her supervisor insisted, reassuring her that it would be "strictly business" to discuss staff and job-related matters. The employee felt threatened and unable to refuse the invitation. Although the two drove to the restaurant in separate vehicles, the supervisor presented her with a bouquet of flowers when she arrived and, instead of discussing business, proceeded to talk about his unsatisfactory sex life with his wife and need for extramarital affairs. The supervisor also informed her that the company was about to undergo reorganization and, if she "played her cards right," she could have any job she wanted. He began playing with her earring, told her she looked like a gypsy, and asked her to have an affair with him. He bragged that he did pretty much what he wanted in the company and no one questioned him, claiming

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[28] *DFEH v. Bottoms* (2005) FEHC Dec. No. 05-03.

[29] Gov. Code, § 12940, subd.(j)(1).

[30] *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, *overruled on other grounds*.

that he once hired a waitress he met in a restaurant to be his secretary because of her large breasts.

The next day, the female employee complained about the supervisor's behavior. Thereafter, the incidents of harassment became less frequent, but did not cease completely. For instance, the supervisor cupped his hand on her breast and asked her if she had "softened up yet" or "Have you changed your mind?"

The supervisor subjected the complainant to quid pro quo sexual harassment.[31]

The offer or demand may be communicated either explicitly or implicitly. In other words, the offer or demand may be overt or implied, or communicated nonverbally through gestures or body language. It may be expressed verbally, in writing or in any other manner which causes the employee to understand and appreciate that the offer or demand is being communicated.

The person extending the offer or making the demand that the employee engage in the objectionable conduct must be either a person who has actual control over the terms and conditions of the employee's employment *or* whom the employee reasonably believes has such control. Thus, in most instances, the harasser is the employee's supervisor, a member of management, or the employer's agent.

Example: A male secretary is employed in the company's administrative division and directly supervised by that division's manager. He is subjected to sexual propositions, advances, and requests for dates by the female manager of the employer's sales division who tells him that if he does not accept her invitations, she will make sure that his employment is terminated. The secretary may reasonably believe that the sales manager, because of her position within the organization, has the authority to carry out her threat, resulting in the imposition of liability upon the employer for the manager's behavior.

4. Hostile Work Environment

Hostile environment sexual harassment is "unwelcome conduct [that] is sufficiently severe or pervasive to alter the conditions of the [employee's] employment and to create an intimidating, oppressive, hostile, abusive or offensive work environment, or otherwise interfere

[31] *Id.*

with his[/her] emotional well-being or ability to perform his[/her] work."[32]

The federal Equal Employment Opportunity Commission's (EEOC) guidelines define hostile environment harassment as sex-based conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."

Sexual harassment is unlawful conduct that occurs *because of* the victim's sex/*gender*.

> Sexual harassment does not necessarily involve sexual conduct. It need not have anything to do with lewd acts, double entendres or sexual advances. Sexual harassment may involve conduct, whether blatant or subtle, that discriminates against a person solely because of that person's sex . . . It shows itself in the form of intimidation and hostility for the purpose of interfering with an individual's work performance.[33]

Stated differently, "[s]exual harassment occurs when, . . . sex is used as a weapon to create a hostile work environment."[34]

Early decisions emphasized that it was sufficient for the victim to demonstrate that he/she would not have been subjected to the conduct in question but for his/her sex/gender.[35] For instance, a female victim could establish that she would not have been victimized if she were male, or vice versa.

> *<u>Example</u>: A female police officer claimed that she was subjected by her male co-workers to hostile environment sexual harassment, alleging that they:*
>
> - *Spread untrue rumors about her abilities;*
> - *Deliberately singled her out for unfavorable assignments and shifts;*
> - *Filed unsubstantiated complaints about her job performance;*
> - *Made crude statements to the effect that her baton was only useful for performing sexual acts;*

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[32] *DFEH v. Lactalis USA, Inc.* (2002) FEHC 02-15; see also *Birschtein v. New United Motor Mfg., Inc.* (2001) 92 Cal.App.4th 994, 1000; *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 516-520; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608; *Harris v. Forklift Systems, Inc*. (1993) 510 U.S. 17.

[33] *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, disapproved on other grounds.

[34] *Singleton v. U.S. Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564.

[35] *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341.

- *Stuffed the barrels of her shotgun with paper so that it would explode when fired;*
- *Spread rumors that she had slept with her superiors for the purpose of receiving desirable assignments; and*
- *Threatened to disrupt her wedding.*

The complainant also contended that she was deliberately overburdened with double work assignments, denied assistance, excluded from group activities, and mimicked in the presence of her peers. She claimed that double standards for male and female officers were acknowledged but she was told to live with them, threatened with bodily harm in a room full of officers who took no action, and subjected to sexual advances, in addition to derogatory remarks about her and women generally.

The court held that the conduct alleged was "sufficiently severe and pervasive so as to establish the existence of a long-standing abusive working environment." The male police officers made it clear that they did not want a female officer working in the department with them. That behavior "constitute[d] a continuous manifestation of a sex-based animus. . ." which violated the FEHA.[36]

<u>Example</u>: Many times each day the manager of a marina approached his male subordinate from behind and grabbed the employee's hips while gyrating so as to simulate sexual conduct while engaging in crude, sexually-tinged commentary. He also called the male employee derogatory names exhibiting gender-based hostility, stating, "Make me some coffee, bitch" and "Did you drink my Dr. Pepper, bitch?"

When the male employee complained of hostile environment harassment, the respondent defended the manager's actions on the ground that the behavior was just good-natured "horseplay" among male co-workers. The evidence showed that the supervisor referred exclusively to his male subordinate as "bitch," never using that term to refer to any female employees. Likewise, the physical conduct in question was directed solely to the male complainant.

The behavior complained of was "because of" the complainant's sex/gender (male) and since the male complainant found it extremely offensive and unwelcome, constituted a violation of the FEHA.

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[36] *Ibid.*

As the law has evolved, the courts have come to recognize that the type of behavior at issue in sexual harassment cases, "whether motivated by hostility or by sexual interest, is always 'because of sex' regardless of the sex of the victim."[37]

> *Example: A female employee of an automotive manufacturing plant was stationed at a fixed point on the assembly line for the duration of her shift. Parts and materials were delivered to the line via forklifts throughout the day. On three or four occasions, a male forklift driver (co-worker) asked her to go on a date with him, but each time she declined. He also crudely explained how he wanted to engage in sexual activity with her and described the fantasies he was having about her. The complainant found his conduct shocking and frightening, and complained to management.*
>
> *After she complained, the forklift driver never spoke to the complainant again but "began a campaign of staring at her" over a period of approximately six months. At least five to ten times per day, he drove by her assigned work station on his forklift and stared at her for "at least several seconds." Eventually, he began driving the forklift to an area behind a pillar and "just sit[ting] there, five to ten minutes at a time, just staring at [complainant]." Although complainant testified that she gave him "dirty looks" and waved at him to go away, he persisted. She again complained to management. Thereafter, the frequency and duration of the incidents decreased, although they did not stop altogether. The company's written anti-harassment policy prohibited "leering or staring, such as stopping work to watch others go by, excessive looking at someone's private body parts; . . ." Nonetheless, following an internal investigation, the employer declined to take disciplinary action against the forklift driver.*
>
> *The complainant claimed that she was subjected to a hostile work environment. The court held that, although the question would ultimately have to be answered by the jury, it could not categorically rule that "repeated acts of staring at a fellow worker cannot qualify as actionable sexual harassment. . ." The forklift driver waged a "prolonged campaign of staring at plaintiff – acts that were directly related to, indeed assertedly grew out of, the antecedent sexual harassment." Thus, a jury could find the behavior was a "continuous manifestation of a sex-based animus."*[38]

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[37] *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409.

[38] *Birschtein v. New United Motor Mfg., Inc.* (2001) 92 Cal.App.4th 994 [emphasis in original]. See also *Hirase-Doi v. U.S. West Communications, Inc.* (10th Cir. 1995) 61

More and more, the courts are recognizing that a hostile or abusive work environment can be created for one gender when the offensive workplace conduct has a greater impact on those person(s) than on members of the opposite sex. In all instances, the courts will analyze both the objective *and* subjective components of the behavior, i.e., whether a reasonable person similarly situated would have found the conduct offensive, as well as whether it was subjectively objectionable to the complainant.

> *Example: A 53-year-old female complainant alleged that she was subjected to hostile work environment harassment while employed as a field supervisor for a home security company. From time to time, the company required its sales force to participate in "team building" exercises. They competed in various contests and were either awarded prizes for winning or, if they lost, subjected to humiliating consequences such as having pies smashed in their faces, being force-fed baby food or sardines, made to squash an egg on their own head or wearing only a diaper in front of their co-workers.*
>
> *The complainant alleged that on three occasions during her five-month term of employment, she was spanked with a competing alarm company's yard sign in front of her co-workers. During the spankings, the sales force shouted lewd comments, including "bend over, baby," "spank it hard," "make sure she feels it," and "you've been a bad girl."*
>
> *The security company argued that no unlawful harassment occurred because both men and women participated in the conduct and emphasized that participation was always "voluntary." The sales meetings were characterized as "camaraderie-building exercises" and compared them to fraternity hazings such as swallowing a goldfish, stressing that there was no intent to cause harm to any employee.*
>
> *The security company violated the FEHA. The activities which took place at the sales meetings made the complainant's work environment hostile. Because she was significantly older than and the supervisor of many of the other sales employees, she saw herself as a "mother figure" to them Moreover, the spankings had a greater impact on the complainant because of her gender (female) than on the male employees. "No reasonable middle-aged woman would want to be put up there before a group of*

F.3d 777; *Henderson v. Whirlpool Corp.* (1998) 17 F.Supp.2d 1238; *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, *disapproved on other grounds.*]

young men, turned around to show her buttocks, get spanked and called abusive names, and told it was to increase sales and motivate employees."[39]

Example: Three female complainants alleged that they were subjected to a sex-based hostile work environment. They pointed to numerous instances of their male supervisor "shouting in a loud and hostile manner at female employees. The shouting was frequent, profane, and often public." It occurred with little or no provocation, and was frequently coupled with offensive physical behavior. For instance, the supervisor came up behind one of the complainants, stood over her, and stared at her for no apparent reason; he lunged across a table and shook his fist at one of them, and also came up behind her, grabbed her shoulders, and yelled "get back to your office." One complainant alleged that the supervisor pumped his fist in her direction to emphasize the point he was trying to make, causing her to step back and tell him that she found his behavior physically threatening. Other employees confirmed that the supervisor regularly invaded the complainants' "personal space" and intimidated female employees, noting the "general fear of the women at our office."

The case was premised upon the theory that:

> *An abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men. There is no logical reason why such a motive is any less because of sex than a motive involving sexual frustration, desire, or simply a motive to exclude or expel women from the workplace.*

The question before the court was whether or not the supervisor's "treatment of women differed sufficiently in quality and quantity from his treatment of men to support a claim of sex-based discrimination." Stated differently, the court was called upon to decide whether "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." There is "no legal requirement that hostile acts be overtly sex- or gender-specific in content, whether marked by language, by sex or gender stereotypes, or by sexual overtures." Direct comparative

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[39] *Orlando v. Alarm One* (2006) Fresno County Superior Court. (See http://www.modbee.com/local/v-print/story/12096967p-12848557c.html, http://www.workforce.com/section/00/article/24/35/90.html, http://www.harpers.org/HittingTheBottomLine.html, and http://www.lawroom.com/Print_S.asp?STID=1429.)

evidence of the manner in which the alleged harasser treated both men and women is always relevant, although it need not be shown that the alleged harasser had a specific intent to discriminate or create a hostile environment. It is sufficient to show that a pattern of abusive behavior was directed solely at members of one sex/gender.

The court held that "evidence of differences in subjective effects (along with, of course, evidence of differences in objective quality and quantity) is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex- or gender-specific."

The evidence showed that the subjective impact of the supervisor's workplace behavior was very different for men and women. There was no evidence that any male employee "manifested anywhere near the same severity of reactions (e.g., crying, feeling panicked and physically threatened, avoiding contact with [the supervisor], avoiding submitting overtime hours for fear of angering [the supervisor], calling the police, and ultimately resigning) to [the supervisor's] conduct as many of the female employees have reported." Therefore, a reasonable jury could conclude that the supervisor's pattern of verbal and physical intimidation of female employees was both severe and pervasive enough to constitute a violation of the FEHA.[40]

To establish that sexual harassment made an employee's work environment hostile, it is not necessary that the employee suffer tangible or economic loss such as a lost promotion or pay increase, or loss of the job itself.[41]

<u>Example</u>: The female complainant, a daytime bartender, was subjected to sexual harassment by the club's disc jockey/karaoke host. During the first few months of her employment, the disc jockey made "several romantic overtures" to her, including writing letters in which he described his strong feelings for and desire to enter into an intimate relationship with her. The complainant was not interested.

Following a July 4 incident during which the disc jockey was so inebriated that the complainant refused to serve him any more alcohol, the parties' friendly relationship deteriorated. The disc jockey began calling the complainant sex-based names, making derogatory comments about her body and clothing, and mocking

[40] *E.E.O.C. v. National Educ. Ass'n, Alaska* (9th Cir. 2005) 422 F.3d 840.
[41] *DFEH v. Lactalis USA, Inc.* (2002) FEHC No. 02-15.

the way in which she walked. He devised at least one acronym, "NOTNA," which he nicknamed her to express his dissatisfaction with her physical appearance ("no ---s, no ---"). The behavior took place in front of bar patrons and other employees.

The disc jockey admitted calling the complainant "NOTNA," but argued that it was just friendly workplace banter even while acknowledging that the complainant communicated her discomfort to him and asked him to refrain.

Additionally, the disc jockey came to the club during the day when he was not working and stood at the end of the bar staring at the complainant as she performed her duties, angrily ordering her to complete specific tasks such as making coffee for him. He contended that he had to remain in the bar to assure that the complainant performed her duties properly.

The FEHC concluded that, over the course of a six-month period, the disc jockey's behavior made the complainant's workplace a hostile, abusive environment. He used "inherently gender-specific, sexual references" and "offensive explicit references to women's bodies and sexual conduct" that were "'intensely degrading' to women." "NOTNA" was a term "critical of the female body, referring to complainant's supposed lack of '---s' and '---.' Thus, 'NOTNA,' as used by [the respondent] was a gender-specific, sexualized insult to women, and to complainant in particular." Moreover, the respondent's "taunting of complainant's walk, his criticisms of her clothing as too tight or too loose, and his constant staring at her, after she rejected his advances, constituted unwanted conduct directed at the complainant based on her sex."[42]

5. Hybrid Cases

Some cases involve behavior which constitutes *both* quid pro quo and hostile environment sexual harassment.

<u>Example</u>: In the case of the complainant whose male supervisor demanded that he stay overnight in the supervisor's hotel suite, discussed above, the complainant alleged both quid pro quo and hostile environment harassment.

The complainant was told he would receive more money if he stayed in the supervisor's hotel suite (quid pro quo) and asserted that "a hostile, sexually harassing environment existed which

[42] *DFEH v. Nulton* (2003) FEHC Dec. No. 03-10.

disrupted [his] 'emotional tranquility in the workplace and otherwise interfered with and undermined his personal sense of well being.'"

The court stated:

> *As might be expected, cases sometimes involve a hybrid of these two theories. A hostile work environment may result from inappropriate sexual conduct in the workplace. Under such circumstances the plaintiff may allege that the unwelcome sexual advances were sufficiently pervasive so as to also alter the conditions of employment and create an abusive work environment.*[43]

Example: In the case of the complainant who was subjected to quid pro quo sexual harassment by the real estate broker for whom she worked, discussed above, the FEHC also found that she was a victim of hostile work environment sexual harassment.

The respondent called the complainant vulgar, gender-specific epithets, especially when she rebuffed his demand that she engage in sexual conduct with him. He commented about her body (telling her, for instance, that she was beautiful and had a nice "butt") and touched her on numerous occasions in an offensive manner, e.g., he asked her for hugs, grabbed her buttocks, touched her thigh, and laughed when she protested, telling her to "take [him] to court" if she did not like his behavior. He posted the aforementioned sign stating "no honey, no money" in the workplace, called her at home incessantly, made unannounced visits to her home, told her that he was watching her, and even threatened that he would have both her and her son murdered if she continued to refuse his demands for sex.

The respondent's behavior was not only severe, but "pervasive, in that [it] consisted of repeated and unremitting sexual epithets, sexual demands, and harassing conduct toward complainant both during and after work hours that made her work environment frightening and degrading."[44]

6. Sexual Favoritism

An "isolated instance" of workplace favoritism when a supervisor is engaged in a consensual relationship with a subordinate will not ordinarily give rise to a sustainable claim of sexual harassment.

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[43] *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409.
[44] *DFEH v. Bottoms* (2005) FEHC Dec. No. 05-03.

Example: Several male complainants alleged that they were unfairly denied a promotional opportunity because of their sex/gender.

Specifically, they were employed as respiratory therapists in the neonatal unit of a hospital that decided to augment the staff by hiring another therapist who would have supervisorial responsibilities. The specifications for the new position included the requirement that qualified candidates be registered with a national board. This had never before been a requirement for either the supervisory position or even the head of the respiratory therapy department. Since none of the male complainants were registered; they were not qualified to apply for the promotional opportunity.

The complainants contended that the requirement was deliberately added for the purpose of excluding them from consideration so that the position could be given to a female therapist with whom the male program administrator was having a romantic relationship. In other words, the complainants contended that the supervisory position was created specifically for the administrator's girlfriend.

The court found no evidence that employment benefits were granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, i.e., the necessary element of coercion or harassment was missing. In dismissing the complaint, the court held that the complainants were not prejudiced because of their status as males; rather, they were discriminated against because [the administrator] preferred his paramour. [Complainants] faced exactly the same predicament as that faced by any woman applicant for the position: No one but [his paramour] could be considered for the appointment because of [her] special relationship to [the administrator].

Because "sex," as that term is used in the statute, refers to "membership in a class delineated by gender, rather than sexual activity regardless of gender," the court found no justification for redefining the term "to include an ongoing, voluntary, romantic engagement." The administrator's actions were unfair, but did not violate the law.[45]

However, if such favoritism is so widespread that it conveys "the demeaning message" to employees that they are viewed by

[45] *DeCintio v. Westchester County Medical Center* (2nd Cir. 1986) 807 F.2d 304.

management as "sexual playthings" or that the "way required for [employees] to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management,"[46] an employee affected by such favoritism may demonstrate that he/she was subjected to harassment in violation of the FEHA.

Example: The male warden of a California correctional facility was engaged in consensual affairs with three female subordinates.

Despite the conflict of interest, the warden served as a member of interview panels and improperly influenced hiring and promotional decisions. For instance, when one of his mistresses was not selected for a promotion, he made clear that he wanted the panel to "make it happen." That same female employee continued advancing through the ranks at a "pace of promotion that was unusually rapid," even though one of the female complainants held a higher rank, had a superior education and a broader range of work experience, and was recommended by the interviewing panel for selection.

Many employees were upset by these developments, making comments such as "what do I have to do, 'F' my way to the top?" and believed that the three women having sexual affairs with the warden were receiving employment benefits not made equally available to other employees. For instance, the warden was present when one of the three employees was arrested for driving under the influence of alcohol, but he failed to initiate an internal investigation or report his own involvement in the incident. The warden also failed to impose appropriate discipline upon the women and allowed them to interfere in the job performance of at least one of the complainants by, for example, "countermanding her orders, undermining her authority, reducing her supervisorial responsibilities, imposing additional onerous duties on her, making unjustified criticisms of her work, and threatening her with reprisals when she complained to [the warden] about their interference." Two of the women with whom the warden was intimately involved bragged that they could use their power over him to obtain employment benefits. One stated that she would get the promotion she sought or she would "take him down" because she knew "every scar on his body."

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[46] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, citing the Equal Employment Opportunity Commission's Ofc. of Legal Counsel, *Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism* (Jan. 12, 1990) No. N-915048 in 2 EEOC Compliance Manual foll. § 615.

The California Supreme Court concluded that widespread sexual favoritism, viewed from the perspective of the reasonable person in the complainants' position, can violate the FEHA if the behaviors complained of are severe or pervasive enough to alter the complainant's working conditions and create a hostile work environment.

It is not necessary that the complainant her/himself be sexually propositioned and the fact that the three women in question were not coerced into having intimate relationships with the warden was irrelevant to the court's analysis. The warden's sexual affairs lasted approximately seven years during which he transferred the women with whom he was involved to the institutions where he served, and "promised and granted unfair employment benefits to the three women." The women were promoted because they granted him sexual favors, not because they were the best candidates. The warden interfered in the job selection process, telling interviewers to "set aside their professional judgment" because he desired to "make it happen." Within the organization, the affairs were common knowledge and "widely viewed as a method of advancement."

The warden's view of his female subordinates as "sexual playthings" impacted the work environment and the "workforce as a whole." His public displays of affection for, and sordid workplace scenes carried out by and involving the three women, were also noted by the court.

The court rejected the defendants' argument that such a case injects the courts into "relationships that are private and consensual and that occur within a major locus of individual social life for both men and women – the workplace." The most important question, in the court's view, was whether or not the conduct in question "conveyed a message that demeans employees on the basis of their sex." Emphasis in such cases is properly placed upon not the personal relationships involved, but their "effect on the workplace."[47]

A claim of sexual favoritism will not be upheld by the courts unless the complainant can demonstrate that favoritism shown to one or more employees was either the result of unwelcome sexual advances (quid pro quo harassment) or severe or pervasive enough to make the work environment hostile or abusive.

[47] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446.

In other words, the harassment claim must fit into one of the two acceptable analytical frameworks recognized by the courts and the FEHC or be a hybrid of the two.

> *Example: The complainant, a legal secretary, began noticing that the attorney by whom she was employed appeared to be involved in a consensual relationship with another female employee. The complainant observed that the other employee received a "larger year-end bonus than any other employee, more valuable Christmas gifts and went with [the attorney] on a private birthday lunch." The complainant also observed the two having "clandestine meetings" and blowing kisses at each other in the workplace. When her employment was terminated, the complainant alleged that she was subjected to sexual favoritism that constituted actionable sexual harassment.*
>
> *The court rejected her claim, finding no evidence that the attorney led the woman with whom he was involved or any other employee "to believe that they could obtain favorable treatment from him if they became romantically involved with him." The incidents cited by the complainant were isolated instances of favoritism that may have been unfair, but did not rise to the level of being severe or pervasive enough to make the work environment hostile or abusive. "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state."*[48]

Finally, cases of sexual favoritism stand in contrast to those involving a claim that the complainant was treated less favorably than employees of the opposite sex because he/she engaged in consensual sexual conduct with his/her supervisor. Numerous courts have held that an employee who engages in such conduct and then suffers an adverse employment action because of the behavior, e.g., termination of his/her employment, cannot complain that he/she was subjected to discrimination or harassment on the basis of his/her sex/gender.

Rather, termination of the complainant's employment is permissible under the FEHA because it results not from unlawful discrimination or harassment but as a result of the complainant's own workplace conduct.

> *Example: A female complainant began work as a secretary, but over the course of nine years enjoyed successive promotions until she was the highest paid employee in the company. She worked*

[48] *Proksel v. Gattis* (1996) 41 Cal.App.4th 1626.

closely with the male owner whose wife was also involved with the company. The wife began to suspect that the owner and complainant were involved in a romantic relationship and, more specifically, that the complainant was intent upon seducing her husband.

On two occasions, the wife observed the complainant and owner touch each other. (In her deposition, the complainant admitted that the touching was "suggestive and of a risqué nature" – the wife could have reasonably suspected them of having an "intimate relationship.") Additionally, the complainant wrote "notes of a sexual or intimate nature" to the owner. The wife discovered the notes and terminated the complainant's employment. The owner reinstated her, but he later fired her again, stating that his wife was "making me choose between my best employee or her and the kids."

The complainant alleged that she was subjected to unlawful sexual harassment and discrimination. She claimed that there had always been joking and sexual banter in the workplace, but no male employee had ever been terminated for having too close a friendship with the owner of the company.

The court dismissed the case, thereby joining a number of courts which have held that the protections offered by Title VII and the FEHA extends to discrimination or harassment "based on a person's sex, not on his or her sexual affiliations," holding that

> *[w]here an employee engages in consensual sexual conduct with a supervisor and an employment decision is based on this conduct, [the FEHA] is not implicated because any benefits of the relationship are due to the sexual conduct, rather than the gender, of the employee. Such action does not account to discrimination [or harassment] on the basis of the employee's status as a man or a woman; rather, it is based on the employee's own actions and therefore is permissible.*[49]

However, the fact two individuals have a history of romantic or sexual involvement does not automatically preclude a finding sexual harassment occurred. For instance, if the "scorned" partner protests the termination of the relationship and thereafter engages in a pattern of offensive and repugnant behavior, the conduct may be sufficient to support a finding that the FEHA was violated:

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[49] *Tenge v. Phillips Modern Ag Co.* (8th Cir. 2006) 446 F.3d 903.

<u>Example</u>: The female complainant was in a committed relationship and resided with another woman. Her married male supervisor was unaware of her living arrangements. He invited her to have dinner with him. She accepted the invitation because they had always enjoyed a congenial working relationship and believed that he wanted to discuss business matters over dinner. Instead, he informed her that he was attracted to and wanted to have a sexual relationship with her. She acquiesced, but the next morning she went to his office and informed him that she felt their relationship must be "strictly professional." She told him that their activities of the prior evening "must never happen again."

The supervisor refused to accept the complainant's feelings and was determined to continue a romantic relationship with her. He began a pattern of blocking her movements in the workplace, standing next to the wall of her cubicle and staring down at her as she attempted to complete her work, and making inquiries of other employees about her personal life and living arrangements. Having heard speculation that she was involved in a romantic relationship with another woman, he began making inappropriate references to homosexuality during meetings and in conversations with the complainant and other employees, frequently concluding his remarks with a nod or other gesture and smile directed at complainant. He left notes on her desk containing references to famous persons who were gay. For example, on one occasion, he added the verbiage "just like Oscar Wilde . . .?" to his critique of her work product (Oscar Wilde was a gay British playwright). He also told complainant that "if you want a real man, you want me. Or do you want a real man?" At an inappropriate hour, he called her home and hung up without identifying himself, followed the complainant when she left work, admittedly to see where she was going and with whom. When the complainant threatened to tell his wife about his conduct if it did not cease, he became upset and tearful, and begged the complainant to resume their brief sexual relationship. When she refused, he told her he would "ruin" her career and see to it that she lost her job and would "never get another one."

The supervisor engaged in harassing behavior because of the complainant's sex (female) in violation of the FEHA.

G. Analysis of the Elements of the Prima Facie Case

1. Unwelcome Conduct

The conduct in question must have been *unwelcome*. In other words, the complaining employee must have found the behavior in question offensive, repulsive or repugnant.

The United States Supreme Court clarified in 1986 that an employer may not defend against a claim of sexual harassment by asserting that an intimate or sexual relationship in which the victim and harasser engaged was "voluntary," i.e., the victim was not forced to participate against his/her will. Stated differently, the complainant was not sexually assaulted or raped, but complied with the request that he/she engage in sexual behavior(s) to avoid the negative consequences he/she believed would flow from his/her refusal. Such compliance does not automatically excuse the employer from liability.

> *Example: A female complainant alleged that during her four-year tenure as a bank branch manager, she was subjected to sexual harassment. She claimed that the bank's vice president repeatedly demanded that she provide him with sexual favors during and after work hours. She asserted that she gave in to his demands by having sexual intercourse with him approximately 40 or 50 times, but that he also raped her on several occasions. The complainant further complained that the vice president fondled her when other employees were present, followed her into the bathroom, and exposed himself.*
>
> *The bank argued that if the complainant and respondent had a sexual relationship, it was "voluntary" and, therefore, the bank could not be held liable for the vice president's behavior.*
>
> *The court rejected the bank's defense. The fact that sexual conduct by the complainant was "voluntary," i.e., that the complainant was not forced to participate against his/her will, is not a viable defense. "While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, . . . [t]he correct inquiry is whether [the complainant] by [his/]her conduct indicated that the alleged sexual advances were unwelcome, not whether [his/]her actual participation in sexual intercourse was voluntary."*[50]

[50] *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57.

As the court noted, determining whether workplace behavior was unwelcome is frequently more difficult than ascertaining whether the complainant's participation was voluntary or involuntary. "Because sexual attraction may often play a role in the day-to-day social exchange between employees, 'the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected' sexual advances may well be difficult to discern."[51]

The courts will assess whether the victim's conduct is consistent with his/her assertion that the conduct was unwelcome by evaluating the totality of the circumstances.[52] A complainant's allegations that he/she was subjected to unwelcome behavior will be significantly weakened if:

a. There is evidence that he/she engaged in the same type of conduct about which he/she complains.

b. There is evidence that the complainant did not protest or object to the conduct in some fashion, although such proof is *not* required in order to sustain the claim.

A victim of sexual harassment may fear that he/she will be subjected to retaliation or reprisals for complaining about the harassment. The "employee's natural feelings of embarrassment, humiliation, and shame may provide a sufficient excuse for delay in reporting acts of sexual harassment by a supervisor."[53] Such concerns may explain and justify a delay in opposing the conduct or complete failure to protest it, depending upon the particularized circumstances of the case.[54] In such instances, the employee's conduct in response to the harassment will be "judged against a standard of reasonableness, and this standard 'is not as high as the standard required in other areas of law.'"[55]

Moreover, the employer may not have in place a legally sufficient workplace policy prohibiting harassment, may not have an adequate internal complaint procedure and/or may have failed to communicate

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[51] Equal Employment Opportunity Commission, *Policy Guidance on Current Issues of Sexual Harassment*, N-915-050, March 19, 1990, citing *Barnes v. Costle* (D.C. Cir. 1977) 561 F.2d 983, 999.

[52] *Ibid.*

[53] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026.

[54] The EEOC explains it this way: "The relevance of whether the victim has complained varies depending upon 'the nature of the sexual advances and the context in which the alleged incidents occurred.'" (EEOC, Equal Employment Opportunity Commission, *Policy Guidance on Current Issues of Sexual Harassment*, N-915-050, March 19, 1990, citing 29 C.F.R. § 1604.11(b).)

[55] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, citing *Green v. Smith* (1968) 261 Cal.App.2d 392.

the contents of its workplace policy and complaint procedure to its workforce.

At all times, the *employer* bears the burden to demonstrate that it adopted and communicated an appropriate policy and complaint procedure which protected employee confidentiality to the extent possible, that the policy was applied fairly and uniformly, and that employees were encouraged to utilize the existing complaint procedure.[56]

> *Example: A male maintenance mechanic at a manufacturing plant was the only mechanic assigned to work the graveyard shift. He claimed that he was subjected to harassment by his male co-workers.*
>
> *He complained that his co-workers called him "Sing-a-ling" which he understood to be a reference to the gay character portrayed by actor Bernie Mac in the movie entitled "Life." They also made comments such as, "What you got on, G string?" and suggested that he engaged in oral sex with his male supervisor in order to retain his job. One employee told him that "he would hold my hair and screw from behind. He would hold my hair and f--- me in the a--" and "I'll take you out to the silo, too, and you can perform oral sex on me." The mechanic alleged that the behavior took place "continuously, every night" and "challenged me as a man." He asserted that work became a "living hell," and "that his performance was adversely affected."*
>
> *The complainant asserted that he complained to his supervisors about the behavior on numerous occasions and submitted a written statement that included the comment: "I would welcome anyone to come to this plant at 2:00 a.m. or 4:00 a.m. to see what is really going on."*
>
> *The court found that the complainant demonstrated the first element of the prima facie case, i.e., that the conduct in question was unwelcome. The conduct was "hostile and abusive," the complainant was "taunted, and [ ] his work was disrupted and sabotaged."*[57]

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[56] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026. (See "The Doctrine of Avoidable Consequences," discussed in detail below.)

[57] *Singleton v. U.S. Gypsum Co.* (2006) 140 Cal.App.4th 1547.

2. Target of the Behavior in Question

An employee can be a victim of a hostile work environment "even though no offensive remarks or touchings are directed to or perpetrated upon that employee."[58]

Generally, the objectionable behavior at issue must have taken place in the employee's immediate work environment *and* be personally witnessed by the employee.[59] The courts have reasoned that if the employee does not personally witness the incidents directed at others, the incidents in question cannot impact his/her "perception of the hostility of the work environment."[60]

It is not necessary that the offensive conduct be behavior that *could have* been directed toward the complainant because of his/her membership in a protected class. Stated differently, there is no requirement that the "offensive remarks or behavior be directed at individuals who are members of the [complainant's] own protected class. Remarks targeting members of other minorities, for example, may contribute to the overall hostility of the working environment for a minority employee."[61]

However, in limited circumstances, behavior that is not directed at the complainant may not give rise to a violation of the FEHA if the employee is advised of the nature of the workplace atmosphere prior to accepting the employment.

> *<u>Example</u>: The complainant was employed as an assistant to the writers of the television series "Friends." She was warned during the job interview that the show contained adult themes and content so she would be exposed to sexual jokes and discussions. However, she contended that the pre-employment description of the workplace atmosphere sorely underestimated the actual work environment which was permeated with "sexually coarse and vulgar language and conduct, including the recounting of [the male writers'] own sexual experiences,. . ."*
>
> *The complainant conceded that "none of the three male writers' offensive conduct involved or was aimed at her."*

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[58] *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d at p. 610.
[59] *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d at p. 611.
[60] *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th at p. 519.
[61] *Cruz v. Coach Stores, Inc.* (2nd Cir., 2000) 202 F.3d 560, referencing *Schwapp v. Town of Avon* (2nd Cir. 1997) 118 F.3d 106 [harassment of other minorities was relevant to whether a black police officer experienced a racially hostile or abusive working environment.]

The California Supreme Court found that "[t]he circumstance that this was a creative workplace focused on generating scripts for an adult-oriented comedy show featuring sexual themes is significant in assessing the existence of triable issues of facts regarding whether the writers' sexual antics and coarse sexual talk were aimed at [complainant] or at women in general, whether [complainant] and other women were singled out to see and hear what happened, and whether the conduct was otherwise motivated by [complainant's] gender." The court rejected complainant's argument that she was subjected to a hostile work environment, based upon the following factors:

- *The behavior in question did not involve and was not aimed at the complainant or any other female employee;*
- *The behavior took place in a group where both male and female employees were present and participated;*
- *Like the male writers, the female writers discussed their own sexual experiences in order to generate material for scripts;*
- *There was no evidence that the conduct to which the complainant objected affected her work hours or duties or those of her male counterparts in a disparate manner;*
- *There was no evidence that members of one sex were exposed to disadvantageous terms or conditions of employment to which members of the opposite sex were not exposed; or*
- *That if the complainant had been a man she would not have been exposed to the same conduct;*
- *There was no evidence that the behavior was calculated to make the complainant uncomfortable or self-conscious, or to intimidate, ridicule or insult her.*[62]

When a complainant asserts that he/she was subjected to offensive workplace conduct that was not directed at him/her, the courts require him/her to demonstrate that the behavior "permeated" his/her direct workplace environment and was "pervasive and destructive."[63] The court will consider the "totality of the circumstances," focusing on the "nature of the workplace environment as a whole,. . . "[64]

Example: In the case involving the "Friends" scriptwriters, the court found that some of the behavior cited by the complainant did

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[62] *Lyle v. Warner Brothers* (2006) 2000 WL 1028558.

[63] *Lyle v. Warner Brothers* (2006) 2000 WL 1028558, citing *Fisher v. San Pedro Peninsula Hospital,* 214 Cal.App.3d at p. 610.

[64] *Cruz v. Coach Stores, Inc.* (2nd Cir. 2000) 202 F.3d 560.

target certain female employees for "personal insult and derogation because of their sex." However, the court deemed those incidents neither severe nor pervasive enough to impose liability upon the respondents since there were only a couple of instances.

Additionally, the court found the complainant's testimony about her subjective perceptions "contradictory," leading it to conclude that the evidence did not demonstrate that she was required to work in an objectively hostile environment. She testified that she was "appalled, mortified, and offended. . ." by the male writers' behavior, but also found their conduct "puerile and annoying, rather than extreme or destructive: she testified the writers' room was 'like being in a junior high locker room' and described the writers as 'pimply-faced teenagers' and 'silly little boys' who engaged in 'very juvenile, counterproductive behavior' . . . "[65]

<u>Example</u>: The complaint of a clinical staff psychologist in a detention facility was rejected by the court.

The complainant alleged that the acting senior psychologist made offensive references to other female employees, calling one a "regina" who "laughs like a hyena," and referring to another as a "madonna," "regina" and "castrating bitch." In the same conversation, he referred to women generally as "bitches" and "histrionics." The comments were inarguably offensive, but uttered mainly in a flurry on a single day. On one or two occasions prior to that day, he had engaged in similar conduct, but the complainant testified that she did not regard it as harassing. His comments were made solely about other employees – he never directed a sexual insult at the complainant.

Considering all the circumstances, including the fact that the offensive conduct was concentrated on one occasion and occurred in the wake of a workplace dispute, the court found the behavior was neither frequent, severe nor abusive enough to interfere unreasonably with the complainant's employment.[66]

3. Severe or Pervasive

Determining whether the conduct in question was severe or pervasive enough to meet the legal standard for the imposition of liability is the most conceptually difficult, confusing and unpredictable aspect of the law. This is largely because the courts have reached differing and

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[65] *Lyle v. Warner Brothers* (2006) 2000 WL 1028558.
[66] *Kortan v. California Youth Authority* (9th Cir. 2000) 217 F.3d 1104.

sometimes contradictory conclusions on the question of whether the behavior complained of was sufficiently severe or pervasive to be legally actionable.[67]

To establish a prima face case, it must be shown that the conduct complained of was so "severe or pervasive" that the victim's work environment was negatively impacted. Stated differently, the conduct must "alter the conditions of employment" for the complainant.[68] Sometimes it is said that the work environment became so permeated with repugnant, unwelcome conduct that it became "toxic" to the victim.

The courts have held that offensive workplace conduct that is "occasional, isolated, sporadic, or trivial" is not legally actionable unless the behavior is extremely severe. Thus, the prima facie case is normally demonstrated by a showing of "a concerted pattern of harassment of a repeated, routine, or a generalized nature."[69]

> *<u>Example</u>: There was more than sufficient evidence that complainant was subjected to unlawful verbal and physical sexual harassment spanning a period of three years. The offensive conduct began during her very first week of employment. A company administrator who was in charge of two supervisors, including complainant, put his hand on her knee and asked if she "fooled around." She told him to leave her alone, but did not complain.*
>
> *Over the next three years, the harasser came up behind complainant and placed his hands on her breast, pinched her buttocks as she walked by him, grabbed her crotch, and asked her inappropriate questions such as "what kind of lingerie [she] was wearing underneath her clothes," and specific sexual acts she engaged in/enjoyed. Her testimony was corroborated by other employees who had witnessed the harasser engaging in comparable behavior.*[70]

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[67] DFEH staff members should consult with a DFEH Legal Division Staff Counsel to obtain guidance on whether the conduct alleged in a particular case is likely to be found severe or pervasive by the FEHC or court.

[68] *Harris v. Forklift Systems, Inc*. (1993) 510 U.S. at p. 21.

[69] *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th at p. 131, relying upon *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d at p. 610. See also *Smith v. Northwest Financial Acceptance, Inc.* (10th Cir. 1997) 129 F.3d 1408, 1414 ["isolated incidents of harassment, while inappropriate and boorish, do not constitute pervasive conduct."]

[70] *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397.

The conduct in question will be judged by the "totality of the circumstances."[71] Thus, the factors that the court will take into consideration include, but are not limited to:

- The context or situation in which the behavior took place;
- The expectations of the parties (employer and employees);
- The nature and quality of the relationship(s) of the parties;[72]
- The frequency of the conduct complained about;
- The severity of the conduct complained about;
- Whether the conduct was physically threatening or humiliating, or merely an offensive utterance/statement.[73]

Generally, there is an inverse relationship between the severity of the behavior in question and the number of instances of unlawful conduct which will be sufficient to establish a prima facie case. As one court observed, "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct."[74] "[T]he greater the harassment – the more protracted or egregious, as distinguished from isolated or ambiguous, it is – the likelier is the employer to know about it or to be blameworthy for failing to discover it."[75]

Stated differently, "when the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions."[76]

As noted above, it is not necessary that the victim suffer a loss of tangible job benefit(s) in order to prevail, but when there is no such loss, the courts will require a "commensurately higher showing that the

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[71] *Cruz v. Coach Stores, Inc.* (2nd Cir. 2000) 202 F.3d 560.
[72] *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81-82
[73] *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. at 23.
[74] *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 878, citing *King v. Board of Regents of University of Wisconsin System* (7th Cir. 1990) 898 F.2d 533, 537 ["[G]enerally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident."]
[75] *Al-Dabbagh v. Greenpeace, Inc.* (1994) 873 F.Supp. 1105, 1111.
[76] *Lyle v. Warner Brothers* (2006) 2006 WL 1028558.

sexually harassing conduct was pervasive and destructive of the working environment."[77]

It is also not necessary that the victim suffer psychological injury in order for the legal standard to be met and the harasser held liable for his/her conduct.[78]

a. A Single or a Few Isolated Incident(s)

The courts have held that in order for a single incident of harassment to be sufficient to establish employer liability, the behavior in question must be "severe in the extreme and generally must include either physical violence or a threat thereof."[79]

Even unwelcome sexual touching has been deemed insufficient in cases where the behavior is isolated and there is no evidence of violence or threat of violence.

> *Example: The complainant, a 911 operator, was subjected to unwelcome touching by her male co-worker. He put his hand on her stomach, commenting about its softness and sexiness. She told him to stop and forcibly pushed him away. Later the same evening, the co-worker positioned himself behind the operator's chair to prohibit her from getting up and leaving the area. He forced his hand under her sweater and bra, and fondled her breast. She pushed his hand away, telling him he had "crossed a line." He responded, "You don't have to worry about cheating [on your husband], I'll do everything" and approached her as if to fondle her again before being interrupted when another employee entered the room.*
>
> *The complainant immediately complained to her employer. The employer responded promptly, placing the co-worker on leave the very next day, pending an investigation.*

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[77] *Lyle v. Warner Brothers* (2006) 2006 WL 1028558, citing *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d at 610, quoting *Jones v. Flagship Intern.* (5th Cir. 1986) 793 F.2d 714, 210.

[78] *Harris v Forklift, Systems, Inc.* (1993) 510 U.S. at p. 23.

[79] *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 877-878. [The court observed, in dictum, that a single incident of forcible rape might be sufficiently severe to create a hostile work environment. Indeed, three years later, *Al-Dabbagh v. Greenpeace, Inc.* (1994) 873 F.Supp.1105, so held.]

When the employer determined that its sexual harassment policy had been violated the offending co-worker resigned rather than have his employment terminated. He also pled "no contest" to criminal charges of misdemeanor sexual assault for which he served 120 days in jail. The complainant attempted to return to her duties after an absence of six months during which she was treated by a psychologist, but claimed that she was subjected to retaliation and eventually left her employment.

The employer's investigation revealed that the co-worker had made "improper advances" to at least two other female employees prior to the date that he assaulted the complainant, but neither had complained to the employer. Therefore, the employer had no knowledge of the co-worker's prior inappropriate workplace conduct.

The complainant claimed that she was subjected to hostile work environment sexual harassment because the incident "pervaded her work environment to such a degree that she required psychological help and even then was unable to successfully return to her job." The court held that she had submitted sufficient evidence to support the subjective portion of her prima facie case, i.e., that she was personally offended and repulsed by the behavior.

However, with reference to the objective, "reasonable person" standard, in light of the totality of the circumstances, the court found the employer was not liable for the co-worker's behavior. Stated differently, the complainant could not meet the "knew or should have known" standard as is required in order to hold an employer liable for harassment committed by a co-worker.

Because only the employer can change the terms and conditions of employment, an isolated incident of harassment by a co-worker will rarely (if ever) give rise to a reasonable fear that sexual harassment has become a permanent feature of the employment relationship. By hypothesis, the employer will have had no advance notice and therefore cannot have sanctioned the harassment beforehand. And, if the employer takes appropriate corrective action, it will not have ratified the conduct. In such circumstances, it becomes difficult to say that a reasonable victim would feel that the terms and conditions of her employment have changed as a result of the misconduct.

The court held that, in order to prevail, the complainant was required to show that "she reasonably feared she would be subject to such misconduct in the future because the city encouraged or tolerated [the co-worker's] harassment." The court declared that "[n]o reasonable woman in [complainant's] position would believe that [her co-worker's] misconduct had permanently altered the terms or conditions of her employment." The court did not rule out the possibility that a single incident of sexual harassment might suffice to sustain a claim, but observed that "the incident must be extremely severe."[80]

Example: The nonprofit employer maintained a "loose work atmosphere" in which employees were allowed to use alcohol and recreational drugs in the workplace.

The 20-year-old complainant had worked only five days as a telephone donation solicitor when she was attacked by a co-worker who "had a reputation as a 'womanizer' and engaged in inappropriate conduct of a sexual nature toward, and made unwelcome sexual overtures to, female employees." As the complainant was preparing to leave work, the harasser attempted to kiss her and, when she rebuffed him, "slapped her, tore off her shirt, beat her, hit her on the head with a radio, choked her with a phone cord and ultimately forced her to have sex with him." The harasser was convicted of rape and sentenced to serve six years in prison.

The complainant contended that she was subjected to a hostile work environment. The court agreed, finding that she presented a prima facie case as to both the subjective and objective components, i.e., a reasonable person would have found the environment hostile and the complainant demonstrated that she personally perceived it as such.

Although the court did not phrase its findings in terms of "severe or pervasive" conduct, it is implicit in its holding that it found the single incident of workplace conduct egregious and severe enough to hold the employer liable. Moreover, the employer had "turned a blind eye to [the harasser's] sexual abuse of female employees in its [ ] office before [the complainant] fell victim to it and consequently suffered grave bodily and psychological injury."[81]

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[80] *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917.
[81] *Al-Dabbagh v. Greenpeace, Inc.* (1994) 873 F.Supp. 1105.

Example: Two art students at a private, postsecondary educational institution created a pencil drawing approximately 25 by 40 inches entitled "The Last Art Piece." It depicted one of the complainants, the school's 82-year-old accounting office cashier, in addition to other members of the faculty, staff, and students "engaged in various sexual acts. [The eldest complainant] appears in the center of the drawing, bare-breasted and facing the viewer. She is depicted sitting on top of a nude male faculty member, straddling his groin as though the two were engaged in sexual intercourse." The drawing was displayed in the school's main gallery for an approximate total of 24 hours. The school maintained anti-harassment policies applicable to students, faculty, and staff, in addition to an anticensorship policy which included specific procedures for lodging an objection to any exhibit or presentation.

The drawing was controversial and caused the complainants to be very upset, although the eldest never actually saw the drawing while it was on display. She claimed nonetheless that she suffered an allergy attack the afternoon that she learned of the drawing, in addition to problems with eating and sleeping. She contended that she left the campus the day that she learned about the drawing and never returned to her job again.

The complainants, including the cashier's daughter and granddaughter who were also employed by the school, alleged that the drawing created a hostile work environment in violation of the FEHA. The court held that although the single incident at issue, the display of the drawing, was "doubtless upsetting" to the complainants, it was neither severe nor pervasive enough to create an abusive work environment that unreasonably interfered with the complainants' work performance.

The court observed that the "nature of the alleged harassment in this case does not begin to approach the severity of rape or violent sexual assault or even milder forms of unwanted physical contact. None of the [complainants] was physically touched or subjected to any sort of verbal abuse." The eldest did not see the drawing until long after it had been removed from the exhibit and her daughter and granddaughter were not depicted in the drawing. The purpose of the drawing was not to harass the

complainants, but to "make a point about representational art." One of the artists wrote a letter of apology to the eldest complainant in which he stated, "I never meant to harm anyone." Thus, the court held that "no reasonable jury could conclude that the presence of 'The Last Art Piece' in the main gallery for 24 hours constituted severe harassment within the meaning of the FEHA."[82]

b. Length of Employment

Even though the complainant's length of employment with the respondent is brief, the conduct that occurred during the period of employment may still be found to be either severe or pervasive enough for liability to be imposed upon the employer.

Example: Two women were hired by a freight shipping company to serve as the receptionist and freight booking agent. Both were single mothers with young children. One had received public assistance for a number of years. Thus, both women were highly motivated to obtain and maintain steady full-time employment that would allow them to support themselves and their children.

The President of the freight shipping company had full authority to hire, fire, set pay rates, and otherwise control the working conditions of the company's five to eight employees. During interviews with both complainants, the President made unlawful inquiries (e.g., whether she was happily married and had children[83]*) and concluded both interviews with a demand that the complainant give him a hug. He repeated that demand on the complainants' first day of employment. He also pressed his chest against their backs when he spoke to them, and asked them to go out with him. He asked one complainant to work on Saturday, stating that he "wanted her so bad" and inquired of the other complainant if he could take her out for drinks and then to a hotel. His behavior escalated until one evening after business hours he called one of the complainants into an office, grabbed her, pushed her up against the wall, and tried to "grind" against her stomach. He also attempted to block the door so that she could not escape. The next day, when the complainant would not enter into a "truce" with him, the President terminated her employment and, two days later,*

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[82] *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142.

[83] Such inquiries constitute a violation of Gov. Code, § 12940, subd. (d).

terminated the other complainant's employment on the basis of the women's friendship.

Although the two complainants only worked for the shipping company two weeks and ten days, respectively, the harassment was found by the FEHC to be severe because it involved touchings and, as to one of the complainants, a physical assault. It was also pervasive because it occurred on a daily basis. Both complainants were entitled to recover damages for the harm they suffered, even though they endured the harassment for only brief periods of time.[84]

Example: The complainant was a cashier in a music store that sold instruments, equipment, etc. During her first week of employment, she was not subjected to any unwelcome offensive conduct. However, in her second week of employment the store manager began talking about his personal life, commenting on the complainant's appearance, stating that her eyes were "dreamy" and "so pretty," and telling her how much he liked her long hair. He began bringing her flowers (on several occasions, a single rose), stared at her and once used her name in a love song that he sang to her. He told the complainant he wanted her to wear tighter jeans and tuck in her tee-shirt to "show off [her] butt." He also invited her to attend a Chamber of Commerce barbeque party and out-of-town "getaway weekend" where they would share a hotel room. The complainant declined both invitations.

However, around the third week of her employment, the manager asked the complainant to go to Yosemite on a business trip with two disc jockeys in order to learn about the equipment she sold in the store. He indicated that he would not be going on the trip. The complainant agreed, but was dismayed when the manager showed up, as well. Worse, she was required to ride in a van alone with him and, instead of coming home that night, he rented a hotel room and told her the two of them would be staying in it. She found herself stranded with no vehicle or cash.

She asked the disc jockeys about the situation and learned they had been told she was only there because she was the manager's girlfriend. They assisted the complainant by shielding her from the manager.

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[84] *DFEH v. Atlas World Lines, Inc.* (2000) FEHC Dec. No. 00-01.

After returning home, the complainant reported for work the next day where she found her boyfriend confronting the manager. The manager told her boyfriend she had gotten drunk during the trip and "come on to" him. The complainant noticed that her name was crossed off the work schedule for that week. When she asked the manager why, he explained that he wanted to give her more time to spend with her boyfriend. The complainant felt she had no choice but to quit her job.

The FEHC found that even though the harassment took place over a short period of time – about three weeks – it was both severe and pervasive enough to hold the respondents liable for the emotional and physical symptoms from which the complainant suffered as a result of the manager's conduct.[85]

c. Workplace Harassment Coupled with Violence or Threats of Violence

As discussed above, workplace harassment can also involve actual or threatened acts of violence. Less egregious behavior that would be deemed severe or pervasive in and of itself can occur *coupled with* actual or threatened acts of violence. In such instances, the courts have noted that the behavior can dramatically escalate the victim's subjective perception of the level of hostility in the workplace, irrespective of the actual number of incidents at issue.[86]

Example: In the case of the bartender who was harassed by the disc jockey and karaoke host, discussed above, the respondent's sexual harassment of the complainant began after an episode on July 4 when the complainant refused to serve the respondent any more alcohol. He became violent. He threw bar stools around the club, swore and screamed vulgarities at the complainant before grabbing a large beer bottle-shaped balloon and hurling it at the bar. The balloon hit the mirror behind the bar and broke it, causing the complainant to feel threatened and frightened. The harassment "took place in a context where [the respondent] had previously become physical – throwing an object, breaking a mirror in the bar – making complainant feel

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[85] *DFEH v. Perez dba Music Factory* (1997) FEHC Dec. No. 97-14.

[86] DFEH staff should consult with a DFEH Legal Division Staff Counsel whenever the conduct alleged includes acts of violence or intimidation by threat of violence because of the complainant's sex, thereby perhaps violating both the FEHA and Ralph Act.

threatened." Thus, the harassment was unquestionably severe given the already existing climate in which it occurred, as well as its "inherently degrading and demeaning nature."[87]

Example: The real estate broker who demanded that his female employee engage in sexual activities with him or lose her employment, discussed above, threatened that he could have the complainant and her family murdered if she reported his behavior. He boasted that he was the "King of Richmond," therefore, the local police would not assist the complainant. His bragging about having someone murdered in the past lent credibility to his threats and intensified the complainant's fear. In addition, the respondent stalked the complainant by telling her he was watching her, parking and remaining in his car outside her home late at night, calling her home at all hours of the day and night, and entering her home without her permission or consent where he surprised and frightened her. On one occasion, he chased complainant's vehicle with his own. The respondent's conduct was both severe and pervasive, and caused the complainant to be "nervous, upset, anxious, and fearful." In addition to violating the FEHA, the respondent's behavior violated the Ralph Act because it constituted "intimidation by threat of violence . . . because of complainant's sex."[88]

d. Harassment Because of Sex and Other Protected Bases

The complainant may allege that he/she was subjected to sexual harassment *in addition to* harassment because of his/her membership in another protected class, e.g., race. In that case, several courts have held that the incidents of harassment, in the aggregate, must be evaluated to determine whether the conduct was severe or pervasive.

Example: The complainant was the only woman working in the employer's security force and one of only two African-American guards out of a total of 30. She cited instances where the "n" word was used, in addition to other epithets referencing African-Americans and Mexicans. She claimed that she was referred to by a fellow security guard as "Buffalo Butt" and denied the opportunity to take her lunch break so that she could instead relieve a White co-worker. Additionally, she alleged that her supervisor rubbed her thigh

[87] *DFEH v. Nulton* (2003) FEHC Dec. No. 03-10.
[88] *DFEH v. Bottoms* (2005) FEHC Dec. No. 05-03.

during her probationary period, telling her, "I think you're going to make it." Another supervisor told her that he was going to "put his foot up her a-- so far that she would have to go to clinic to take it out" and touched her offensively on her buttocks while telling her, "I'm going to get you yet." On yet another occasion, she contended that he grabbed her breast. When she fell over, he proceeded to get on top of her.

To determine whether there was a pervasive discriminatory atmosphere, the court ruled that the evidence of racial and sexual harassment should be combined. In other words, the trial court was directed to aggregate the evidence of racial hostility with that of sexual hostility for the purpose of deciding whether the various incidents, viewed as a whole, were severe or pervasive enough to alter the conditions of the complainant's employment.[89]

<u>Example</u>: The complainant, a correctional officer, was an African-American woman. She claimed that she was subjected to numerous incidents of harassment because of her race, as well as her sex (gender). For instance, she claimed the she told by a supervisor that his religion required him to hate all White people and women didn't "belong" working in prisons so she should "get home and put some dinner on the stove for [her] man." She was subjected to several different epithets related to her gender, including but not limited to "bitch" and referred to by the male officers as "honey," "sweetie" and "sugar tits." She claimed that her fellow officers referred to her using the "n" word and she received a telephone call in which a male voice asked her, "You wanta swang, bitch?" She interpreted that comment as a reference to race-related lynchings. During another call during the caller hissed "niggaaaah."

There was an "explicit" link between the harassment based upon the complainant's sex and race. Thus, <u>all</u> incidents of workplace harassment should be taken into account when determining whether or not the conduct was severe or pervasive. The courts have ruled that it would be unjust to dismiss such a case if the sum of all of the harassment [s]he experienced was abusive, but the incidents could be separated into several categories, with no one category containing enough incidents to amount to "pervasive" harassment. Although there is enough evidence of racial

[89] *Hicks v. Gates Rubber Co.* (10th Cir. 1987) 833 F.2d 1406.

harassment for that claim to stand on its own, the district court should allow at trial for consideration of the possibility that the racial animus of [complainant's] co-workers was augmented by their bias against h[er sex]."[90]

4. Behavior Occurring Outside Normal Work Hours or Away from the Employer's Worksite

In order for an employer to be held liable for sexual harassment, the conduct must have occurred in a "work-related context. '[W]hile the offending conduct may and often does occur at the place of work, it need not.'"[91]

Even so, the courts have held that there must be a causal nexus between the unlawful conduct and the employee's work. Thus, it is possible for conduct that occurs outside of normal work hours or somewhere other than the employer's worksite to be the basis of an actionable claim of sexual harassment.[92]

Examples include, but are not limited to, employer-sponsored events such as sports activities (e.g., golf tournaments, baseball games), seminars, meetings, conferences, retreats, parties.

> *<u>Example</u>: The female complainant was employed at a fast food franchise. She went out socially with the male night shift supervisor. She was wearing her work uniform, but the supervisor picked her up at a local grocery store rather than from the employer's premises. After driving around for a period of time, they went to his parents' house where it was undisputed that they engaged in sexual activity. She alleged that he raped her. Afterward, he dropped her off at an auto repair store. The next day, she advised the manager what had transpired and quit her employment.*
>
> *The complainant contended that she was subjected to an intimidating, hostile and offensive work environment. She claimed that her co-worker abused his position of authority as a shift manager when he ordered her not to report for her regularly scheduled shift. Rather, he instructed her to accompany him for the evening, telling her that he had made arrangements for her*

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[90] Based upon *Hafford v. Seidner* (6th Cir. 1999) 183 F.3d 506.

[91] *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, citing *DFEH v. Huncot Properties* (1991) FEHC Dec. No. 91-10 at p. 8.

[92] Stated differently, the courts have held that the "employment must be such as predictably to create the risk employees will [engage in behavior] of the type for which liability is sought."

not to have to punch in until later. The complainant admitted that prior to that incident, the supervisor had not made any sexual advances toward her or asked her for a date. He did not tell her that her continued employment was conditioned upon agreeing to engage in sexual activity with him until he was actually raping her. The employer maintained policies prohibiting sexual harassment and fraternization (dating by co-workers).

The court conceptualized the issue before it as whether or not there was a sufficient causal nexus between the supervisor's conduct and his employment to hold the employer liable. When analyzing whether or not specific conduct is within an employee's scope of employment, the courts traditionally apply a broad interpretation, but will refuse to hold an employer liable for acts committed when an employee substantially departs from his/her duties for purely personal reasons.

The court concluded that the complainant went on the off-duty date willingly; there was no evidence that she was coerced or that the supervisor misused his authority to convince her to accompany him. She did not object to being with him and entered his bedroom willingly. The court rejected the complainant's contention that "but for" the supervisor having called the workplace to advise that she would report for work late, the rape would not have taken place. Even if true, that fact was insufficient to support a finding that the supervisor was acting either within the course and scope of his employment or as the agent of the employer for the purpose of holding the employer liable for his offensive conduct.[93]

Example: A company sponsored a golf tournament. On the day of the tournament, the office was closed for business and all employees were required to attend and assist with the tournament. Among the tasks they were assigned was greeting participants, giving directions, setting up displays advertising the company's services and products, etc.

At the conclusion of the tournament, the company provided dinner for all participants and the employees. Alcoholic beverages were served. The employees were directed to remain after dinner to perform various duties such as collecting leftover promotional materials displayed during the day to be transported back to the office, etc.

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[93] *Capitol City Foods, Inc. v. Superior Court* (1992) 5 Cal.App.4th 1042.

As the secretary to the president of the company was walking toward the parking lot where her car was parked, the president approached her and began a conversation. He appeared to be inebriated. He obstructed the secretary's path to her car, stating that he wanted her to come home with him for the night. She rebuffed his advances, telling him, "Go home and sleep it off. Hopefully, you won't remember any of this when I see you at work tomorrow. And if you do, we won't talk about it, ok?" Undeterred, the president's demands became more emphatic and his voice grew louder as he told her, "If you don't come home with me tonight, there will be no reason for you to show up at the office tomorrow morning." The secretary continued attempting to navigate through the parking lot to her own car, despite the president's attempts to block her way. Finally, he grabbed her by both shoulders pushed her up against a parked car and sexually assaulted her.

The complainant alleged that she was subjected to quid pro quo and hostile work environment sexual harassment. The company defended the claim on the ground that the president's behavior was outside the course and scope of his employment. Further, the company argued that there was no connection between the company's business and the president's conduct.

The company was liable for both quid pro quo and hostile work environment sexual harassment. The golf tournament was directly connected to the company's business since the company sponsored the event, decided who would be invited, advertised its services and products there and required all employees to attend and work at the site of the tournament. The behavior constituted an unlawful offer to exchange a benefit (the secretary's continued employment with the company) for sexual conduct and was sufficiently severe to alter the terms and conditions of the secretary's employment.

Some courts approach the question of whether or not the employer can be liable for acts occurring outside normal work hours and/or off the worksite in terms of the alleged harasser's opportunity to engage in the type of behavior complained about as a result of his/her duties, level of responsibility, or decision-making authority over the complainant's employment. In other words, the courts analyze the amount of power the alleged harasser is able to wield over the complainant irrespective of the venue in which the behavior takes place (in or out of the workplace).

Example: The complainant, an aspiring actor, was advised by a casting director for a major television network that the network was developing new programs in which there might be roles for the complainant. The complainant attended numerous auditions, interviews and meetings with the director over the course of several weeks. He was repeatedly told by the director, "I'm your Manager at [the network]." The director promised the complainant that he would be introduced as a network star at an upcoming event, so the complainant believed that he was about to be hired as an actor in a network production. Accordingly, the court found it was not surprising that, when the complainant was advised by the director to meet him at his home on a Sunday morning at 8:00 a.m., following a Saturday night dinner attended by network executives, he went to the director's home expecting the process of obtaining employment to continue. Instead, the complainant was drugged, beaten, and gang-raped by the director and at least four other men.

The complainant asserted that he was subjected to sexual harassment in violation of the FEHA for which the television network was liable.

The court held that the director was acting as the agent of the network "in terms of finding, grooming, and recruiting actors for [the network's] shows." Although the sexual assault took place at the director's home, not the worksite, on a Sunday morning (outside normal work hours and not on the network's premises), the director's conduct was sufficiently work-related to hold the network liable. "It is not implausible that a casting director, acting as a kind of gatekeeper to the glamorous world of entertainment, occupies a position which will predictably 'create the risk [a casting director] will commit intentional [acts] of the type for which liability. . ." should attach to the employer. In other words, the risk that the director would engage in the unlawful conduct was consistent with imposing liability upon the network. Although the director never informed the complainant that the Sunday morning meeting was a work-related event or one sponsored by the network, in the weeks leading up to the assault, the complainant had spent weeks at the director's "beck and call," attending auditions, meetings, and dining with the director and various entertainment industry executives. Therefore, there was a legally sufficient nexus between the employment relationship and the harassment since "it is not farfetched that [the complainant]

believed his attendance had something to do with advancing his ambition to obtain employment as an actor."[94]

5. The "Reasonable Person" Standard

The perspective of the *victim* of the harassment is foremost in the court's consideration of the behavior(s) at issue.

"The objective severity of the harassment is judged from the perspective of a reasonable person in the complainant's position, considering all of the circumstances, and is guided by common sense and sensitivity to social context."[95] Thus, the courts will consider how a reasonable person who is comparable to the complainant would perceive the harassing acts.[96] The court will evaluate "all the circumstances" surrounding the alleged behavior, as well as the complainant's reaction to it, including but not limited to the complainant's:

- Age
- Work experience
- Gender[97]

The court will also examine:

> the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field – even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and

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[94] *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038. [Comparing the underlying facts to those of *Capitol City Foods, Inc. v. Superior Court* (1992) 5 Cal.App.4th 1042, the court stressed the pattern of behavior by the director emphasizing the complainant's "admission to employment require[d] continuous participation in a variety of activities at various locations in pursuit of his acting career."]

[95] *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th at 517, citing *Oncale v. Sundowner Offshore Services, Inc*. (1998) 523 U.S. 75, 81.

[96] *DFEH v. River Meadow Trailer Park* (1998) FEHC Dec. No. 98-15; *DFEH v. Anderson* (1999) FEHC Dec. No. 99-08.

[97] *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872.

> juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the [victim]'s position would find severely hostile or abusive.[98]

In order to make the prima facie showing, it must be demonstrated that the work environment was both objectively *and* subjectively offensive, i.e., that the workplace would be found hostile or abusive by a reasonable person *and* that the victim *actually* perceived the environment to be hostile or abusive.[99]

> *Example: A female revenue agent received bizarre letters from her male co-worker in which he claimed to be "watching" and "experiencing" her, referenced sex, and promised that he would write to her again. He also asked her to join him for lunch and other social interaction. After she complained to her supervisor, he was counseled to leave her alone and transferred to another office.*
>
> *He filed a union grievance which was settled. Under the terms of the settlement agreement, he was transferred back to the original worksite in exchange for his promise to leave the complainant alone. Instead, he requested that they participate in joint counseling and wrote her another letter in which he claimed to have a relationship with her.*
>
> *The court held that, viewing the evidence from the complainant's perspective, it was reasonable for her to be shocked and frightened by the co-worker's behavior. It was also reasonable that she viewed his conduct as severe and pervasive enough to alter a condition of her employment and create an abusive working environment.*[100]

6. Liability for Workplace Sexual Harassment

As noted above, under California law, any person who engages in workplace sexual harassment can be held personally liable for the

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[98] *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81-82.

[99] *Lyle v. Warner Brothers* (2006) 2006 WL 1028558, citing *Faragher v. Boca Raton* (1998) 524 U.S. 775, 787; see also *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. at p. 21-22; *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th at p. 518-519.

[100] *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872. [In this landmark decision, the Ninth Circuit formulated the "reasonable woman" standard. That standard evolved over time into the "reasonable *person*" standard as the courts recognized the viability of claims of same-sex/gender harassment.]

harm caused by his/her own conduct.[101] This is referred to as "individual liability."

There is no individual liability for sexual *discrimination*.[102] Liability for discrimination is imposed solely upon the "employer," i.e., a person employing *five* or more employees.[103]

With regard to workplace *harassment*, an "employer" is defined as a person employing *one* or more employees.[104]

a. Employer Liability: Sexual Harassment by a Supervisor, Manager or Managing Agent

Employers are *strictly liable* for sexual harassment committed in the workplace by supervisors, managers, or agents of the employer.[105] "[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor."[106]

The employer may defend against the complaint by contending that the behavior complained of either never occurred at all or, if it did, the behavior was neither severe nor pervasive enough for the employer to be held liable.

That means that if the employee's complaint is found to have merit, the employer *and* the harassing supervisor may *both* be held liable to the complainant for all harm he/she suffered as a result of the harassment. Once the complaint is found to have merit, the only remaining question deals with what remedy is appropriate. Whether the employer knew the harassment was taking place and failed to intervene is irrelevant.[107]

b. Who is a "supervisor"?

Whether or not an alleged harasser is a supervisor is usually a question of fact to be determined by examining the circumstances of his/her employment and duties in consideration of the definition set forth in the FEHA:

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[101] Gov. Code, § 12940, subd. (j)(1).
[102] Gov. Code, § 12940, subd. (a).
[103] Gov. Code, § 12926, subd. (d).
[104] Gov. Code, § 12940, subd. (j)(4)(A); *Reno v. Baird* (1998) 18 Cal.4th 640, affirming *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55.
[105] Gov. Code, § 12940, subd. (j)(1).
[106] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042.
[107] *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 415.

"Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[108]

Example: The harasser was a company administrator who directly oversaw the work of two supervisors, one of whom was the victim of sexual harassment. The harasser had the power to fire the victim. The court found that he was a supervisor and, therefore, the employer was strictly liable for his conduct.[109]

c. Employer Liability: Sexual Harassment by a Co-Worker

In order to hold the employer liable for sexual harassment committed by a non-supervisory employee, i.e., co-worker, the evidence must demonstrate that:

- The employer knew or should have known of the harassment; *and*
- The employer failed to take "immediate and appropriate corrective action" – steps designed to stop and remedy the harassment.[110]

d. The Employer Knew or Should Have Known of the Harassment.

Under California law, if an employer's supervisors, managers and/or managing agents are aware of unlawful behavior in the workplace, that knowledge is imputed to the employer. Stated differently, if the employer's supervisorial personnel know about the harassment, the employer is deemed to know about the harassment, even if the supervisors or managers never report the conduct to their superiors.

Example: An employee of a youth correctional facility was subjected to a pattern of harassment because of his sexual orientation (gay). He was subjected to derogatory

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[108] Gov. Code, § 12926, subd. (r).
[109] *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397.
[110] Gov. Code, § 12940, subd. (j)(1).

statements and called vile names by both his immediate supervisor and a nonsupervising security officer assigned to the kitchen where the complainant worked as a cook. The security officer also threw garbage into the complainant's work area and told the wards incarcerated there not to assist the complainant in the kitchen.

The correctional facility attempted to defeat liability by arguing that the complainant notified his superiors about the harassment but did not specifically tell them that the harassment was motivated by his sexual orientation. The court quickly dispensed with that argument based, in part, upon the nature of the allegations and the comments and verbiage that both the kitchen manager and another supervisor, described as a "lead person," heard. In fact, the food manager, with whom the complainant discussed the harassment at least 20 times, told the complainant "[e]veryone thinks you are gay." Therefore, the court found unavailing any suggestion that the employer did not know the harassment occurred because of the complainant's sexual orientation.

Accordingly, liability was imposed upon the employer for the nonsupervising security officer's behavior. Supervising employees knew about the conduct – whether or not they actually reported it to management was irrelevant. The fact that they possessed knowledge of the harassment was sufficient to impute that knowledge to the employer.[111]

<u>Example</u>: The complainant was subjected by a co-worker to unwelcome touching, commentary about her body, and inquiries about the possibility of a sexual liaison, as well as sexually derogatory language and threats. In the complainant's presence, the harasser also made threatening remarks about other employees. She spoke with her supervisor on at least three separate occasions about her discomfort and expressed her concerns in several written memoranda.

The employer took no action, claiming that there was no corroboration of the incidents reported by the complainant,

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[111] *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577. [Although the case deals with harassment because of sexual orientation, rather than sex (gender), it is discussed here because the principles enunciated by the court are fully applicable to cases in which harassment because of sex (gender) is alleged.]

even though the harasser admitted that some of the behavior occurred.

The FEHC observed that it is not unusual for there to be no direct percipient witness to sexually harassing conduct, nor was it surprising in this instance since the complainant and harasser frequently worked alone together in the office. At a minimum, however, the employer had sufficient information to trigger a prompt investigation into complainant's allegations. The investigation should have been designed to both protect the complainant from future incidents, as well as deter the harasser from further offensive conduct. The employer did nothing and was liable for the harm suffered by the complainant.[112]

Example: A female complainant received a telephone call at home from a female co-worker who declared that she liked the complainant "like a man likes a woman" and wanted to go on a date with her. The complainant said "No" and hung up the phone. The next day she reported the incident to her supervisor, stating that she was afraid and wanted the co-worker to leave her alone. The supervisor responded that her superior was out of the office and would return in a couple of days.

At that point, the complainant expressed no concern about waiting for the superior's return. However, later that same day, the co-worker called the complainant's workstation at least three times and again asked her out. The complainant made three more verbal complaints. Two days later, she encountered her co-worker outside the workplace. The co-worker called her name "in an angry manner," so the complainant ran from her and then decided to write her a letter in which she explained "I don't 'swing that way.' . . . So please don't call me anymore and I don't want to talk about this at all . . . let's just pretend you never said anything to me o.k." She provided a copy of the letter to her supervisor and tried to avoid the co-worker, but when they passed in the hallway, the co-worker "made a fist which she slammed into her other palm while at the same time looking at [complainant] and frowning."

The complainant's supervisors asked her if she wanted them to "do anything other than what [complainant] had done in giving the letter to [her co-worker]." The complainant

[112] *DFEH v. Lake County Dept. of Health Services* (1998) FEHC Dec. No. 98-11.

reiterated that she wanted the co-worker to leave her alone and asked that the supervisors communicate to the co-worker that the complainant was not interested in her.

Two days later, the co-worker asked to have a meeting with the complainant's supervisor and was told to ask her own supervisor to set it up. The co-worker then walked by the complainant's desk and said "I'm going to get your A-S-S." She struck the complainant on the back of the head and neck. The co-worker's employment was terminated because of the altercation.

While the harasser's behavior must be severe or pervasive in order to be actionable, "there is no requirement that the employee endure sexual harassment until his or her psychological well-being is so spent that the employee requires psychiatric assistance." In this instance, the complainant repeatedly complained to her employer about her co-worker's behavior, yet the employer took no action "until [the complainant] had been attacked, beaten and battered . . ."

In its defense, the employer argued that, between the initial telephone call placed by the co-worker and the physical attack, less than seven days elapsed. Thus, there "was insufficient time for [the co-worker's] conduct to have evolved into a hostile work environment for [the complainant]." The court disagreed, finding that the case escalated into violence quickly when the co-worker slammed her fist into her other palm while looking at the complainant. Up to that point, the co-worker had just been "boorish or overbearing." But the fist-slamming incident could be found by a jury to have altered the conditions of the complainant's employment. She reported it to her supervisor who took no action either that day or the next. It was not until after the complainant was attacked that the employer finally intervened.

Because both the complainant's immediate supervisor and her superior were fully aware of the incidents that had taken place, the employer could be held liable for the co-worker's harassing behavior.[113]

[113] *Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153.

e. Employer Liability: Sexual Harassment by a Third Party

In 2003, the FEHA was amended to include the following verbiage:

> An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.[114]

The California Legislature declared it was "enacting this act to construe and clarify the meaning and effect of existing law. . . " In other words, the FEHA has *always* provided protection for sexual harassment committed by nonemployees of the employer in question such as clients, customers, delivery persons or any other third party who enters the workplace and engages in such conduct to the detriment of the employer's employees, job applicants, or independent contractors.[115]

> *Example: The female complainant was employed as a bus driver by a company that transported developmentally disabled adults and children. When the complainant was hired, the bus company was already in possession of six written reports detailing the misconduct of one male client. Three were filed by male drivers and three by female drivers who claimed that the client had exposed himself to them.*
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> *For a few days, the complainant drove with one of the male drivers for the purpose of learning the route. During that time, the client about whom prior complaints had been lodged touched her hair, wanted to be near her, stared at her, and made her feel uncomfortable. He called her "bonita" (beautiful). She was "scared and felt uncomfortable around [the client] from the first day she met him." But when she asked the dispatcher if she had to transport him, the only response she received was "I guess."*
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> *After a few days of driving the route by herself and continuing to experience problems with the client, she requested a different route. She also filed two incident*

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[114] Gov. Code, § 12940, subd. (j)(1), amended by Stats. 2003, ch. 671, § 1.
[115] *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 930.

reports, the first related to an incident during which the client exposed himself to and grabbed her. The second report detailed a full-fledged attack upon the complainant during which the client exposed his genitals, touched her all over, tried to put his hands under her shirt and shorts, and rubbed his face against hers. On that occasion, she was finally aided by two male drivers from other buses who heard her cries for help. After that altercation, the complainant felt she had no choice but to quit her job.

The complainant alleged she had been subjected to sexual harassment in violation of the FEHA. Because the Legislature clarified Government Code section 12940, subdivision (j)(1), to "expressly" hold an employer liable for sexual harassment by clients or customers, the appellate court ordered the case returned to the trial court for a jury trial on the merits.[116]

Example: A male employee of a department store alleged that he was subjected to escalating sexual harassment by a male customer over the course of a two-month period.

The employee reported two incidents of harassment by the customer to his superiors, but the store took no action. The fifth and final incident occurred when the customer entered the store and asked the employee out on a date. The customer offered the employee a business card bearing his telephone number and address. When the employee politely rebuffed his advances by explaining that he had a girlfriend, the customer persisted, making unflattering comments about complainant's girlfriend. The customer noticed that the complainant had a tattoo on his neck and asked the complainant to show it to him while reaching for the complainant's shirt collar. The complainant again politely declined, stating that the tattoo was personal.

Moments later, when the complainant bent over to pick up a piece of paper, the customer physically attacked him from behind. The employee defended himself by striking the customer in order to distance himself from the customer before calling the store's loss prevention personnel and asking that the customer be escorted from the premises.

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[116] *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318 (*rehearing denied*).

Because the employee complained about the behavior in question, but the store took no corrective action or preventive steps to ensure the employee's right to work in an environment free from harassment, the employer was liable for the harm suffered by the employee as a result of the customer's harassment.

Example: The complainant was employed as a nurse by a care home for veterans, most of whom were over the age of 62 or had disabilities that prevented them from living independently. She was assigned to care for a tenant who was recovering from penile implant surgery who made suggestive remarks to her about her anatomy. She befriended him and invited him to her home, hoping that his remarks would cease after he saw her interacting with her husband and family. However, his behavior worsened. He told her that he wanted to sleep with her and that he would ruin her reputation by telling other persons that he had. He made good on the threat. One day she heard him telling others that he had sexual encounters with her at the local Motel 6. She complained to her supervisor, but the harassment continued. Her supervisor advised her to have no contact with the resident, provided him with counseling and equipped the complainant with a walkie-talkie with which to call security if the resident continued his offensive conduct. The resident's behavior included an attempt to ram the complainant with his electric scooter. Eventually, the complainant was forced to take an administrative stress leave. She filed suit, alleging that she was subjected to sexual harassment in violation of the FEHA.

Finding that the Legislature's amendment of section 12940, subdivision (j)(1), was merely a clarification of existing law, rather than a substantive change to the FEHA, the California Supreme Court held that the case could proceed.[117]

f. Limitation on Damages: The Doctrine of Avoidable Consequences

The California Supreme Court ruled that "strict liability is not absolute liability in the sense that it precludes all defenses [cites omitted]. Even under a strict liability standard, a plaintiff's own conduct may limit the amount of damages recoverable or bar recovery entirely."[118]

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[117] *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914.
[118] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042.

An employer may, depending upon the facts of the case, assert the "doctrine of avoidable consequences" to limit the amount of damages for which it will be liable to the victim of workplace harassment committed by a supervisor. The doctrine provides that a person cannot be compensated for damages that he/she could have avoided suffering through his/her own reasonable effort or expenditure. Stated differently, the victim "may not recover damages that [he/she] could easily have avoided."[119]

> *Example: The complainant alleged that she was subjected to sexually harassing behavior by her immediate supervisor that included in appropriate comments and unwelcome physical touching. For instance, he offered to overlook her attendance problems if she would allow him to touch her and then proceeded to grab her. When she lodged an internal complaint, the employer immediately involved its civil rights personnel, conducted an investigation and concluded that the supervisor had violated its anti-harassment policy.*
>
> *However, the complainant did not lodge her complaint until the harassment had gone on for nearly two years. When she sued the employer, it defended on the ground that it had "exercised reasonable care by promulgating, instituting and disseminating throughout its workplace policies and procedures, offering training courses, and other methods. . ." to prevent harassment. It further claimed that the complainant had been made aware of its policies and procedures, and participated in training courses. Therefore, the employer asserted that the complainant's failure to take advantage of the employer's policies and procedures was unreasonable because had she utilized those mechanisms, she could have avoided suffering the harm for which she was seeking a remedy. The court agreed.*[120]

Application of the doctrine to hostile environment sexual harassment cases is consistent with the FEHA's public policy of making supervisors the "first line of defense" against workplace sexual harassment. Moreover, a failure to apply the doctrine would serve as a disincentive to employers to establish effective workplace remedies.

The doctrine may be invoked by the employer to limit or escape *damages*, not liability. Thus, in the case of harassment by a

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[119] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1043.
[120] *State Dept. of Health Services v. Superior Court (2003*) 31 Cal.4th 1026.

supervisor, manager or managing agent, the employer remains strictly liable for conduct, but the complainant's failure to take advantage of the employer's internal policies and procedures serves to reduce the amount of damages he/she may recover if that failure was, under the circumstances, unreasonable.

The doctrine has three elements, all of which must be proven by the employer:

1) The employer took reasonable steps to prevent and correct workplace sexual harassment;
2) The employee unreasonably failed to use the preventive and corrective measures that the employer provided; and
3) Reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.[121]

The applicability of the doctrine will depend upon the facts of the case and is limited. The employer can:

> "escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment. . . Employees may be reluctant to report their supervisors to higher management and an employee will often attempt informal negotiation with a supervisor, make efforts to avoid encounters with the supervisor, or resort to other informal strategies. Delay that results from an employee's initial resort to such nonconfrontational means of dealing with supervisor harassment will have to be carefully evaluated to determine whether it was reasonable in a particular employment setting."[122]

Neither the courts nor the FEHC require that, in all cases, the victim of workplace sexual harassment show that he/she immediately reported the conduct using the employer's internal grievance procedures in order to be awarded damages. Rather, the facts will be evaluated to determine if the victim could reasonably be expected to have reported the behavior.

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[121] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1044.
[122] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1044-45.

The factors that the courts and FEHC will consider include, but are not limited to:

- Whether the employer had an appropriate workplace policy in place;
- Whether the employer had an appropriate internal complaint or grievance policy in place;
- Whether the employer communicated its policies to its workforce and, more specifically, the victim;
- Whether the policy prohibited retaliation for reporting violations;
- Whether the employer's policy contains procedures designed to protect employee confidentiality to the extent practicable;
- Whether the employer enforced its policy firmly and consistently, including whether it conducted effective workplace investigations;
- Whether the employer took effective steps to encourage employees to voice their complaints;
- Whether the victim reasonably feared reprisal or retaliation by the harassing supervisor and/or other employees;
- To what extent the victim's "feelings of embarrassment, humiliation, and shame" excuse his/her delay in reporting the conduct;
- The victim's other personal circumstances which might have caused him/her not to complain about the harassment.

H. Employer's Obligation to Prevent and Correct Workplace Sexual Harassment

The FEHA imposes an *independent* affirmative duty on employers to "take all reasonable steps to prevent discrimination and harassment from occurring."[123] The employer must, upon learning that workplace harassment is alleged to have occurred, take "immediate and appropriate corrective action" calculated to stop the harassment and protect the complainant from being further victimized.

The effectiveness of the employer's actions will be measured by determining if two goals were achieved:

- The alleged harassment was ended; and

- Any future incidents of harassment were deterred.[124]

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[123] Gov. Code, §12940, subd. (k). Additionally, "[a]n entity shall take all reasonable steps to prevent harassment from occurring." (Gov. Code, § 12940, subd. (j)(1).)
[124] *DFEH v Madera County* (1990) FEHC Dec. No. 90-03.

The scope of *every* DFEH investigation into a complaint of workplace sexual harassment includes a determination of whether or not the employer fully complied with this obligation. Stated differently, DFEH's investigation will examine the precise steps the employer took "to investigate the charge, to remedy the situation if harassment is found to have occurred and to keep the complainant protected from further harassment and informed both of [his/]her rights and of the employer's responsive actions."[125]

Example: In the case discussed above in which a female employee was asked out on a date by a female co-worker and the situation escalated into violence over a short span of time, the court cited the employer's obligation to take reasonable steps to prevent further inappropriate workplace behavior once it became aware of "any harassment." Both the employee's immediate supervisor and, in turn, his immediate supervisor were aware of the conduct, as well as the complainant's desire for it to stop and to be let alone.

Once the employer was on notice that the complainant's harasser might become violent, its failure to act could be deemed a deliberate indifference toward the complainant's right to work in an environment free from harassment that ultimately resulted in her being intimidated and physically attacked. The employer was held liable for the harm suffered by the complainant.[126]

1. Employer's Workplace Investigation

The employer has an absolute and inescapable obligation to conduct a "prompt, full, and fair investigation of all harassment complaints. Whether or not any harassment will be found to have occurred in a given incident is irrelevant. A full investigation, no matter what its outcome, will be a powerful deterrent to those who might be tempted to harass in the future, just as the failure to investigate or an inadequate investigation, will surely increase their temptation."[127]

There is no hard and fast rule setting forth when an employer must commence its internal investigation into a complaint. The courts will look to the specific facts alleged when evaluating the promptness of the employer's response. Among the factors to be considered are the severity and pervasiveness of the behavior, in addition to whether there is any evidence to suggest that the complainant may be in imminent danger. For instance, in the case discussed above in which

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[125] *DFEH v. Madera County* (1990) FEHC Dec. No. 90-03.
[126] *Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 164.
[127] *DFEH v. Del Mar Avionics* (1985) FEHC Dec. No. 85-19.

the co-worker slammed her fist into her palm upon encountering the complainant, the court focused upon the fact that the employer took no action for several days, by which time the complainant had been physically attacked.

The sufficiency and reasonableness of the investigation will be evaluated with reference to several factors:

- The investigator was neutral and had been trained;
- The investigator interviewed the alleged harasser and the victim, as well as all pertinent witnesses;
- The investigator reviewed all relevant documents;
- The investigator documented the investigation and prepared a written report; and
- The investigator communicated the findings in a confidential manner to the interested parties.

  <u>Example</u>: A female employee was subjected to unwanted touching by a co-worker who was a peace officer. When she immediately reported the incident to her supervisor, the employer quickly transferred the harasser to another location and directed him to refrain from attempting to have any contact with her. The employee also filed a criminal complaint in response to which the police department's internal affairs division began an investigation. As soon as that investigation was commenced, the employer's affirmative action officer, who had begun an investigation into her complaint, discontinued his inquiry into her allegations.

  The internal affairs investigation consisted of interviews with 26 witnesses, only five of whom were asked about the employee's allegations. The focus of the investigation was the female complainant's background, including inquiries into the purchase of her vehicle and truthfulness when applying for her position. At the conclusion of the investigation, the harasser was subjected to some minor discipline because he admitted some inappropriate conduct, but nothing as serious as that alleged by the female employee.

  The court found that the employer's affirmative action officer "abandoned" his investigation once the internal affairs division became involved, even though those investigators had no training or expertise in handling sexual harassment claims and failed to view the investigation as an inquiry into the employee's sexual harassment complaint. Therefore, the investigation failed to

consider the question of whether there was sufficient evidence to show that unlawful harassment occurred.

The internal affairs investigators interviewed the female employee about the incident. The nature of the questions they asked her included her attire when the incident occurred, including whether she was wearing underwear, a bra or pantyhose; details about her romantic relationships and former marriage; whether she had done any modeling work; whether she "danced on a table top" or "while intoxicated" for money while partially clothed or unclothed. The investigation failed to interview witnesses for the purpose of evaluating the alleged harasser's credibility or delve into his background. For instance, not one of his former female co-workers was interviewed.

The court noted that the manner in which the investigation was conducted would deter employees from reporting workplace harassment in the future, rather than deter harassment itself.[128]

Example: In the case discussed above involving the cook in a correctional facility who was subjected to harassment because of his sexual orientation, the court observed that the employer failed to live up to its obligation to investigate the complainant's allegations, despite the fact that he complained on numerous occasions. The undisputed evidence showed that several supervisors were aware of the inappropriate workplace conduct. One of them testified that he told the complainant he was being "picked on" because of his sexual orientation, but he never reported the conduct to his superiors as he felt his "job [was] primarily food production and service. I try not to get into personal things." The court observed that "[i]f management had conducted any kind of investigation to determine the truth, [the supervisors] could have provided the necessary information. In any event, because [ ] was a supervisor, his knowledge was imputed to CYA regardless of whether he was questioned."[129]

2. Evaluation of the Evidence Gathered During the Investigation

It is not unusual for there not to be witnesses to overt acts of workplace sexual harassment. That is because "[h]arassment, by its nature, often occurs when the harasser and victim are alone. Recognizing this, the Commission has never made eyewitness corroboration a prerequisite

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[128] *Sarro v. City of Sacramento* (1999) 78 F.Supp.2d 1057.
[129] *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577.

to a determination that the harassment occurred. The Commission looks instead to the totality of the credible evidence [cites omitted]."[130]

When evaluating the employer's investigation, DFEH staff should note whether the investigator made credibility determinations about party and witness testimony and, if so, what other information was available to and formed the basis for the investigator's decision. The conclusions reached by the employer's investigator may be considered but are not dispositive. In other words, DFEH staff must make an independent determination as to whether or not a particular party or witness provides believable testimony.

This is true as to any complaint investigated by DFEH, but is particularly important when there are no percipient witnesses to the conduct alleged. In sexual harassment cases, evidence of "Contemporaneous reports that unwelcome sexual conduct occurred can be probative of the veracity of complainant's allegations of this conduct."[131]

See discussion in Chapter entitled "Introduction to Case Analysis" regarding witness credibility.

3. Imposition of Discipline upon Harassers

An employer "must take at least some form of disciplinary action" when its investigation reveals that an employee's complaint of workplace sexual harassment is meritorious.[132] Moreover, the severity of the discipline imposed must correlate to the severity of the workplace harassment.

> *Example: In the example discussed above of the peace officer who offensively touched his female co-worker, the court found that the discipline imposed upon the officer, a 20-hour suspension, could be interpreted by a jury as not reasonably calculated to deter future incidents of harassment. Among the factors considered by the court were the insufficient investigation conducted by the employer, as well as the employer's failure to introduce evidence supporting its contention that more severe discipline could not be imposed under the terms of the collective bargaining agreement in place such as an example of similar discipline not being upheld on appeal. Additionally, the employer*

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[130] *DFEH v. Community Hospital of San Gabriel* (1986) FEHC. Dec. No. 86-08 at p. 9.
[131] DFEH v. Atlas World Lines, Inc. (2000) FEHC Dec. No. 00-01, citing DFEH v. River Meadow Trailer Park (1998) FEHC Dec. No. 98-15 at p. 15.
[132] *Sarro v. City of Sacramento* (1999) 78 F.Supp.2d 1057.

introduced no evidence of the type of discipline it had imposed upon other employees for similar behavior.[133]

It is critical that employers assure that disciplinary measures are imposed upon the employee(s) who committed the harassment, *not* the victim(s) of the harassment.[134]

Example: In the case of the cook employed by a correctional facility who was subjected to harassment because of his sexual orientation, discussed above, the employer not only failed to conduct a timely and appropriate investigation, it also failed to discipline the employees who engaged in the harassment. Although one of the supervisors who heard and saw the behavior told the co-worker harasser to refrain from referring to the complainant in derogatory terms, the harassment continued as the supervisor failed to report the conduct to his superiors or take any other meaningful action to stop the harassment.

Rather, both the co-worker harasser and the complainant were counseled to "be courteous to and respect each other, and the harasser was told to seek out a supervisor if he needed any assistance. The two men were told that they would be subjected to disciplinary action if the "conflict" continued and, in fact, the complainant was later denied a merit salary adjustment in part because his "working relationship with staff and wards has been substandard. For instance, [he] had several disagreements with [the co-worker harasser] . . . and [his immediate supervisor who also harassed him]. . ." The co-worker harasser was not removed from the complainant's work area until at least a year and a half after the complainant began complaining about the harassment and his removal was in response to a petition lodged by 14 other employees about his demeanor, not in response to the complainant's requests for assistance.

Example: A female complainant refused her male supervisor's invitations to have dinner and engage in sexual behavior with him. He then commenced a pattern of sexually harassing behavior that included blocking her path as she attempted to move about the workplace, staring at her from across the room and in meetings, and engaging in discussions with her co-workers in which he speculated about her personal living arrangements, and sexual orientation and proclivities.

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[133] *Sarro v. City of Sacramento* (1999) 78 F.Supp.2d 1057.
[134] See complete discussion in Chapter entitled "Retaliation."

After the complainant lodged an internal complaint with the employer's equal employment opportunity office, she was directed to attend a mandatory meeting attended not only by the harasser/supervisor, but his supervisor, the personnel office and equal employment opportunity officer. Both the complainant and harasser were presented with a memorandum outlining areas of the workplace that they were allowed to frequent and, more particularly, designating some areas "off limits" to either one of them. Both were counseled as to the manner in which they should interact with each other when it was absolutely necessary in order to transact business, and both were warned that any violation of the parameters set forth in the memorandum would result in discipline up to and including termination. Moreover, a copy of the memorandum was to be placed in both the complainant and harasser's permanent personnel files.

The employer's response to the complaint was unlawful because it served to penalize her for bringing to the employer's attention the harassing behavior in which the supervisor engaged. While advising the harasser to remain in certain sections of the workplace unless it became absolutely necessary to venture outside those areas in order to conduct business might have been an appropriate means by which to limit his access to the complainant and prevent him from further harassing her, there was no justification for proscribing the complainant's ability to move freely about the workplace. Moreover, the memorandum counseling her about how to interact with the harasser, which was then placed in her permanent personnel file, implied that she had engaged in wrongful conduct, especially considering that it contained a threat of potential disciplinary action being taken against her.

Pending the employer's investigation into a complaint of sexual harassment, it may be necessary for the complainant and alleged harasser to be separated so as to assure the integrity of the investigation and prevent any further incidents from occurring prior to the employer making and acting upon an investigative finding. This can be accomplished by transfer, reassignment or relocation of the alleged harasser to another work station, office, facility or site. An alteration or modification of the terms or conditions of the complainant's employment even on a temporary basis, must be approached carefully and implemented only when absolutely necessary.

4. Employer's Workplace Policy and Complaint Procedure

A comprehensive program to educate its workforce about and prevent sexual harassment in the workplace is the most practical way for employers to avoid liability for damages should harassment occur despite preventive efforts.

As explained above, the "doctrine of avoidable consequences" holds that appropriate preventive measures will not relieve an employer from liability for damages caused by workplace sexual harassment. However, such measures may *limit* the *amount* of damages awarded to the victim. The burden is on the employer to show:

a. It took reasonable steps to prevent and correct workplace sexual harassment;

b. The sexual harassment victim unreasonably failed to use the preventive and corrective measures that the employer provided; and

c. Reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.[135]

5. Employer's Training Program

California employers with 50 or more employees are required to provide two hours of training and education to all supervisory employees every two years.[136]

The training required under section 12950.1 must include:

a. Information and practical guidance about State and federal laws prohibiting sexual harassment, as well as the prevention and correction of workplace harassment, and the remedies available to victims; and

b. Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation.

The training must be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination and retaliation.[137]

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[135] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026.
[136] Gov. Code, § 12950.1, subd. (a).
[137] Gov. Code, § 12950.1, subd. (a).

The State must incorporate the training into the 80 hours of training provided to all new supervisory employees.[138]

If an employer fails to provide the required training, the FEHC has the authority to issue an order requiring the employer to comply.[139]

For the purpose of determining an employer's liability to a victim of workplace sexual harassment, the failure to comply with subdivision (a) is not conclusive to establish liability, *but* the employer's compliance with subdivision (a) will not insulate the employer from liability, either![140]

Finally, the California Legislature has made clear that "[t]he training and education required by this section is intended to establish a minimum threshold and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination."[141]

[138] Gov. Code, § 12950.1, subd. (b).
[139] Gov. Code, § 12950.1, subd. (e).
[140] Gov. Code, § 12950.1, subd. (d).
[141] Gov. Code, § 12950.1, subd. (f).

ANALYTICAL OUTLINE

I. Jurisdiction

Questions to be asked include whether the respondent is an "employer" within the meaning set forth in the FEHA.[142]

II. Elements of the Prima Facie Case of Discrimination

A. Quid Pro Quo Harassment

1. Did the respondent subject the complainant to unwelcome sexual advance(s), request(s) for sexual favor(s) or other verbal, visual or physical conduct of a sexual nature when:

    a. Submission to the conduct was made either explicitly or implicitly a term or condition of the complainant's employment or provision of services; or

    b. Submission to or rejection of the conduct by the complainant was used as the basis for [employment] decisions affecting the complainant?

2. Was the alleged harasser a manager, supervisor or agent of his/her employer? or

    If the alleged harasser was not a supervisor or manager, does the evidence show that the employer or the employer's agents or supervisors knew or should have known of the harassing conduct and failed to take immediate and appropriate corrective action?[143]

B. Hostile Work Environment

1. Did the respondent engage in harassing conduct directed toward the complainant? or

    Did the complainant personally witness or perceive the harassing conduct? and

    Did it take place in his/her immediate work environment?

2. Was the harassing behavior because of the complainant's sex/gender?

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[142] See Chapter entitled "Jurisdiction."
[143] Gov. Code, § 12940, subd. (j)(1).

3. Was the conduct unwelcome and sufficiently severe or pervasive that it had the purpose or effect of altering the condition of the complainant's work environment or prospective work environment? and

   Did the conduct create an intimidating, hostile, abusive or offensive working environment?

4. Would the environment created by the conduct be perceived as intimidating, hostile, abusive or offensive by a reasonable person[144] in the same circumstances as the complainant?[145]

5. Was the environment created perceived by the complainant as intimidating, hostile, abusive or offensive?[146]

6. Was the alleged harasser a manager, supervisor or agent of his/her employer? or

   If the alleged harasser was not a supervisor or manager, does the evidence show that the employer or the employer's agents or supervisors knew or should have known of the harassing conduct and failed to take immediate and appropriate corrective action?[147]

III. Affirmative Defenses

There are no viable affirmative defenses applicable to sexual harassment cases because, unlike some discriminatory actions, there is no legal justification for acts of workplace harassment.

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[144] See detailed discussion below.
[145] This is referred to by the courts as the "objective" perceptual component.
[146] This is referred to by the courts as the "subjective" perceptual component.
[147] Gov. Code, § 12940, subd. (j)(1).

EXPLANATION OF ANALYTICAL OUTLINE

I. Jurisdiction

See Chapter entitled “Jurisdiction.”

A. Quid Pro Quo Harassment

1. Did the respondent subject the complainant to unwelcome sexual advance(s), request(s) for sexual favor(s) or other verbal, visual or physical conduct of a sexual nature when:

   Submission to the conduct was made either explicitly or implicitly a term or condition of the complainant’s employment or provision of services.

   Relevant questions to be answered:

   a. What behaviors are at issue, i.e., what is the nature of the conduct to which the complainant objects?

   b. What terms or conditions were implicated in the behavior? In other words, what terms or conditions of the complainant’s employment did the alleged harasser offer or threaten?

   c. What did the complainant understand to be the behavior expected of him/her in order to secure or preserve specific terms or conditions of his/her employment?

   d. Who engaged in the conduct? Did any other employees join in or participate?

   e. How many times did the behavior occur?

   f. Over what period of time did the behavior occur, i.e., what was the first date upon which the alleged harasser engaged in the conduct complained of and what was the last date upon which the alleged harasser engaged in the conduct?

   g. How frequently did the incidents at issue occur, e.g., every hour, every day, twice per week?

h. Where did the behavior take place?

   1) At what specific locations within the workplace?
   2) At what specific locations outside the workplace?
   3) For behavior outside the workplace and/or normal work hours, what was the context in which the behavior took place, e.g., at an employer-sponsored or employer-sanctioned event, during business-related travel

i. What is the work relationship between the alleged harasser and complainant, e.g., supervisorial or co-worker?

j. What is the social relationship, if any, between the alleged harasser and complainant, e.g., do they have a history of associating outside the workplace and/or work hours? Have they ever dated?

k. Is there any tangible evidence of the harassment, e.g., writings or other objects?

l. Were there any percipient witnesses to the alleged incident(s)?

m. Are there any corroborative witnesses to the alleged incident(s)?

n. How did the complainant respond to the behavior about which he/she complains?

   1) For instance, did he/she tell the alleged harasser that he/she found it offensive, repugnant and/or unwelcome and advise him/her to refrain from that type of conduct in the future?
   2) Is there any evidence that the complainant participated in the conduct?
   3) Is there any evidence that the complainant engaged in the same type of conduct about which he/she has complained?
   4) Has the complainant ever been found to have engaged in the same or similar conduct as that which forms the basis for his/her current complaint?

o. Was the complainant subjected to an adverse employment action?

p. Was the complainant's submission to or rejection of the offer(s)/threat(s) made by the alleged harasser a motivating factor for any employment decision(s) which impacted the complainant?

Stated differently, does the evidence demonstrate a causal connection between the actual or threatened adverse employment action and the complainant's response to the sexual harassment?

Identify the specific act of harm in question. Then refer to and modify, as appropriate, the list of relevant questions presented in the corresponding Chapter entitled Retaliation, including, at a minimum, the following:

1) Is the reason(s) asserted by the employer for the adverse action or threatened action factually accurate?
2) Does the evidence demonstrate that the complainant's resistance or objection to the alleged harasser's conduct was a factor in the actual or threatened adverse employment action?
3) How has the employer responded to/dealt with similarly situated persons?
4) Were the same decision-maker(s) responsible for dealing with similarly situated persons?
5) Does the employer's treatment of the complainant before and after the alleged incidents of harassment indicate that the complainant's resistance or objection to the alleged harasser's conduct was a factor in the actual or threatened adverse employment action?
6) Does any direct evidence demonstrate that the complainant's resistance or objection to the alleged harasser's conduct was a factor in the actual or threatened adverse employment action?
7) Does any anecdotal evidence demonstrate that the complainant's resistance or objection to the alleged harasser's conduct was a factor in the actual or threatened adverse employment action?

<u>Evidence to be gathered/analyzed includes, but is not limited to</u>:

Any and all documentation of the incidents alleged such as:

a. Notes

b. Greeting cards
c. Correspondence
d. Memoranda
e. E-mail messages
f. Tangible items given to the complainant by the alleged harasser such as gifts, e.g., flowers, candy, jewelry, books, items of clothing
g. Diary, journal or blog entries made by the complainant detailing the behavior and/or his/her reaction(s) to it

Interviews to be conducted:

a. Percipient witnesses to the incidents

b. Corroborative witnesses to the incidents

2. Was the alleged harasser a manager, supervisor or agent of his/her employer? or

If the alleged harasser was not a supervisor or manager, does the evidence show that the employer or the employer's agents or supervisors knew or should have known of the harassing conduct and failed to take immediate and appropriate corrective action?[148]

Note: If the harasser was not a manager, supervisor or agent of the employer, however, the complainant reasonably believed that the harasser had authority to affect the complainant's terms or conditions of employment, the prima facie element may be deemed to have been established.

Relevant questions to be answered:

a. What was the alleged harasser's job title?

b. What were the alleged harasser's duties?

c. What was the scope of the alleged harasser's authority to make employment decisions, e.g., hiring, promotion, termination?

d. Has the alleged harasser engaged in similar conduct in the past or concurrently?

1) When?
2) Where?

[148] Gov. Code, § 12940, subd. (j)(1).

e. Has the employer received complaints of similar conduct by the alleged harasser from other current or former employees?

f. If the alleged harasser has engaged in similar conduct in the past, what were the consequences, if any, of that conduct?

   1) Was he/she subjected to discipline?
   2) What form of discipline?

g. Did the employer have in place a policy prohibiting workplace harassment?

h. Was that policy distributed to all employees, including the complainant?

i. Did the employer's policy include a procedure by which employees could file complaints of workplace harassment?

   Did the complainant comply with the employer's complaint procedure?

j. Did the employer conduct an investigation into the alleged harasser's background prior to hiring him/her?

k. Did the employer make investigative findings relative to the complaint?

   1) What were the employer's findings?
   2) Did the employer timely notify the complainant of its findings?
   3) If the complainant's allegations were found meritorious, did the employer take immediate and appropriate corrective action to prevent further occurrences of the behavior? If so, what action did the employer take? What discipline was imposed upon the harasser?

l. If the alleged harasser was a third party (nonemployee), to what extent did the employer have control over his/her behavior?

   1) What was the third party's purpose for being in the workplace?
   2) How often was the third party present in the workplace?

3) How long did the third party typically remain in the workplace?
4) What steps did the respondent/complainant's employer take to alleviate the third party's behavior, e.g., did the employer contact the third party's employer about his/her conduct?

m. Did the complainant lodge an internal complaint with the employer about the behavior?

1) When?
2) By what means?
3) How many times?
4) How did the employer respond to the complaint?
5) What action did the employer take in response to the complaint, e.g., internal investigation, separation of complainant and alleged harasser pending completion of the investigation (if necessary), other steps necessary to protect complainant from further harassment and/or retaliation pending completion of the employer's investigation?
6) Who is the decision-maker(s) for the employer?

<u>Evidence to be gathered/analyzed includes, but is not limited to</u>:

a. Documentation of the alleged harasser's status as a supervisor, manager or managing agent of the employer such as:

1) Job description
2) Duty statement
3) Job function analysis
4) Memoranda
5) Correspondence
6) Meeting minutes
7) Articles of incorporation, bylaws, partnership agreement(s) or other similar documents
8) E-mail messages

b. Documentation related to the complaint(s) lodged with the employer by the complainant:

1) Notes, diaries, journals, chronologies, blog entries drafted by the complainant
2) Notes, memoranda, correspondence, including e-mail(s), in which the complainant discussed the

incident(s) in question and/or detailed his/her reaction(s) to them

c. Documentation of the employer's investigation into the complaint lodged by the complainant:

1) Notes, recordings or transcripts of interviews conducted
2) Documents or other tangible items gathered during the investigation
3) Writings created by the investigator(s) setting forth his/her thoughts, impressions, conclusions

d. Documentation reviewed, considered and relied upon by the employer's decision-maker(s) in determining what action, if any, to take in response to the employer's investigative findings

e. Documentation related to the decision-maker(s)' deliberative process in determining what action, if any, to take in response to the employer's investigative findings

Interviews to be conducted:

a. Current or former employees who have knowledge of the alleged harasser's status as a supervisor, manager or managing agent

b. Current or former employees who lodged complaints concerning the same or similar conduct by the alleged harasser

c. The employer's representative(s) who received or otherwise interacted with the complainant in response to his/her internal complaint and/or the employer's investigation thereof

d. The employer's investigator(s)

e. The employer's decision-maker(s) who determined what action, if any, to take in response to the employer's investigative findings

B. Hostile Work Environment

1. Did the respondent engage in harassing conduct directed toward the complainant? or

Did the complainant personally witness or perceive the harassing conduct, and

Did it take place in his/her immediate work environment?

Relevant questions to be answered:

a. What behaviors are at issue, i.e., what is the nature of the conduct to which the complainant objects?

b. Who engaged in the conduct? Did any other employees join in or participate?

c. How many times did the behavior occur?

d. Over what period of time did the behavior occur, i.e., what was the first date upon which the alleged harasser engaged in the conduct complained of and what was the last date upon which the alleged harasser engaged in the conduct?

e. How frequently did the incidents at issue occur, e.g., every hour, every day, twice per week?

f. Where did the behavior take place?

g. At what specific location(s) within the workplace?

h. At what specific location(s) outside the workplace?

i. For behavior outside the workplace and/or normal work hours, what was the context in which the behavior took place, e.g., at an employer-sponsored or employer-sanctioned event, during business-related travel?

   What is the work relationship between the alleged harasser and complainant, e.g., supervisorial or co-worker?

j. Is there any tangible evidence of the harassment, e.g., writings or other objects?

k. Were there any percipient witnesses to the alleged incident(s)?

l. Are there any corroborative witnesses to the alleged incident(s)?

m. How did the complainant respond to the behavior about which he/she complains?

1) For instance, did he/she indicate in any manner to the alleged harasser that he/she found it offensive, repugnant and/or unwelcome?
2) Did he/she indicate in any manner that the behavior was unwanted, i.e., that he/she wanted the alleged harasser to refrain from that type of conduct?
3) Is there any evidence that the complainant participated in the conduct?
4) Is there any evidence that the complainant engaged in the same type of conduct about which he/she has complained?
5) Has the complainant ever been found to have engaged in the same or similar conduct as that which forms the basis for his/her current complaint?

<u>Evidence to be gathered/analyzed includes, but is not limited to</u>:

Any and all documentation of the incidents alleged such as:

a. Notes
b. Greeting cards
c. Correspondence
d. Memoranda
e. E-mail messages
f. Tangible items given to the complainant by the alleged harasser such as gifts, e.g., flowers, candy, jewelry, books, items of clothing

<u>Interviews to be conducted</u>:

a. Percipient witnesses to the incidents

b. Corroborative witnesses to the incidents

2. Was the harassing behavior because of the complainant's sex/gender?

Relevant questions to be answered:

a. Was the behavior at issue gender-specific, e.g., did the alleged harasser use gender-specific, derogatory epithets, nicknames or terms, engage in discussions or innuendo referring to gender-specific sexual activity or tell jokes targeting a particular gender?

b. Did the behavior at issue demonstrate a bias, animus or hostility toward a specific gender?

c. Was the alleged harasser's conduct toward/around the complainant markedly different than his/her behavior toward/around persons of the opposite gender? In other words, did the alleged harasser conduct him/herself differently when interacting with or in the presence of the complainant than he/she did when dealing with persons of the opposite gender?

Interviews to be conducted:

a. Percipient witnesses to the incident(s)

b. Corroborate witnesses to the incident(s)

c. Current or former employees who lodged complaints concerning the same or similar conduct by the alleged harasser

3. Was the conduct unwelcome and sufficiently severe or pervasive that it had the purpose or effect of altering the condition of the complainant's work environment or prospective work environment? and

Did the conduct create an intimidating, hostile, abusive, or offensive working environment?

Relevant questions to be answered:

a. What precise behaviors are at issue, i.e., what is the nature of the conduct to which the complainant objects?

b. Who engaged in the conduct?

c. How many times over what period of time did it occur, i.e., how many total incidents are at issue and what was their

frequency of occurrence, e.g., every hour, every day, twice per week.

d. Where did the behaviors occur?

e. Was the behavior unwelcome, i.e., unwanted by the complainant. (Note: If the behavior was not unwelcome, the existence of the prima facie elements cannot be established because only conduct that is unwelcome (offensive, repulsive, repugnant) is actionable under the FEHA. In other words, if the behavior was not unwanted when viewed from the perspective of the complainant, there can be no showing that the behavior was harassing.)

Evidence to be gathered/analyzed includes, but is not limited to:

Any and all documentation of the incidents alleged such as:

a. Notes
b. Greeting cards
c. Correspondence
d. Memoranda
e. E-mail messages
f. Tangible items given to the complainant by the alleged harasser such as gifts, e.g., flowers, candy, jewelry, books, items of clothing
g. Diary, journal or blog entries made by the complainant detailing the behavior and/or his/her reaction(s) to it

Interviews to be conducted:

a. Recipient witnesses to the incidents

b. Corroborative witnesses to the incidents

4. Would the environment created by the conduct be perceived as intimidating, hostile, abusive, or offensive by a reasonable person[149] in the same circumstances as the complainant?[150]

Relevant questions to be answered:

a. What was the character/nature of the workplace environment?

[149] See detailed discussion below.
[150] This is referred to by the courts as the "objective" perceptual component.

b. What was the complainant's objective response to the behaviors? In other words, would a reasonable similarly situated person have the same reaction as the complainant?

5. Was the environment created perceived by the complainant as intimidating, hostile, abusive or offensive?[151]

Relevant questions to be answered:

What was the complainant's subjective response to the behaviors?

a. Emotional distress
b. Physical symptoms
c. Interference with his/her ability to work
d. Interference with family and/or social relationships

Evidence to be gathered/analyzed includes, but is not limited to:

a. Any and all documentation of the complainant's subjective response to the conduct such as:

1) Notes
2) Correspondence
3) Memoranda
4) E-mail messages
5) Diary, journal or blog entries, or chronologies made by the complainant detailing the behavior and/or his/her reaction(s) to it
6) Complainant's medical records

b. Complainant's psychological or counseling records

Interviews to be conducted:

a. Percipient witnesses to the complainant's reaction to the conduct

b. Corroborative witnesses to the complainant's reaction to the conduct

[151] This is referred to by the courts as the "subjective" perceptual component.

6. Was the alleged harasser a manager, supervisor or agent of his/her employer? or

   If the alleged harasser was not a supervisor or manager, does the evidence show that the employer or the employer's agents or supervisors knew or should have known of the harassing conduct and failed to take immediate and appropriate corrective action?[152]

   See above.

[152] Gov. Code, § 12940, subd. (j)(1).